(14)

No. 83-1015-ATX
Status: GRANTED

Docketed:
December 16, 1983

Title: National Association for the Advancement of Colored People, etc., et al., Appellants
v.
Hampton County Election Commission, etc., et al.

Court: United States District Court
for the District of South Carolina

Counsel for appellant: Harper II, John R.

Counsel for appellee: Ashworth, Treva G., Bowers, Lee S., Henderson, Karen LeCraft, Davis, Bruce E.

Entry	Date	Note	Proceedings and Orders
1	Dec 6 1983		Application for extension of time to docket appeal and order granting same until December 16, 1983 (Chief Justice, December 7, 1983).
2	Dec 16 1983	G	Statement as to jurisdiction filed.
3	Jan 21 1984		Motion of appellees Hampton Co. Election, et al. to dismiss or affirm filed.
4	Jan 23 1984		Motion of appellees Hampton County School Dist. No. 1, et al. to dismiss or affirm filed.
5	Jan 25 1984		DISTRIBUTED. February 17, 1984
6	Feb 11 1984	X	Reply brief of appellants NAACP, et al. filed.
7	Feb 21 1984	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Marshall DUT.
8	May 24 1984		Brief amicus curiae of United States filed.
9	May 29 1984		REDISTRIBUTED. June 14, 1984
10	Jun 12 1984	X	Supplemental brief of appellants NAACP, et al. filed.
11	Jun 18 1984		PROBABLE JURISDICTION NOTED. Justice Marshall DUT.
12	Aug 6 1984		Order extending time to file brief of appellant on the merits until August 9, 1984.
14	Aug 3 1984		Brief amicus curiae of United States filed.
15	Aug 10 1984		Joint appendix filed.
16	Aug 15 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Aug 13 1984		Order extending time to file brief of appellee on the merits until September 15, 1984.
19	Aug 15 1984		Brief of appellants NAACP, et al. filed.
20	Aug 30 1984		Record filed.
21	Sep 15 1984		Brief of appellee Hampton Co. Sch. Dist. No. 1 filed.
22	Sep 15 1984		Brief of appellees Hampton Co. Election, et al. filed.
23	Sep 18 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Marshall DUT.
24	Oct 10 1984		CIRCULATED.
25	Oct 22 1984		SET FOR ARGUMENT. Wednesday, November 28, 1984. (4th case).
26	Nov 21 1984	X	Reply brief of appellants NAACP, et al. filed.
27	Nov 28 1984		ARGUED.

BEST AVAILABLE COPY

Office - Supreme Court, U.S.
FILED
DEC 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

JOHN R. HARPER II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

JACK GREENBERG
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

*Counsel of Record

Questions Presented

(1) Did the District Court err in holding that, in preclearing an election law under section 5 of the Voting Rights Act, the Attorney General must be deemed to preclear as well all *future* changes in election practices and procedures which may occur in the implementation of that law?

(2) Did the District Court err in holding that changes in election practices and procedures need not be precleared under section 5 of the Voting Rights Act if those changes occur in the implementation of a separate election law which itself had earlier received such preclearance?

(3) Did the District Court err in holding that the implementation of a non-precleared change in election procedures cannot be enjoined under section 5 of the Voting Rights Act unless that change is in fact "alleged to have had either racially discriminatory purpose or effect"?

(4) Did the District Court err in holding that state action knowingly and illegally implementing a change in election law to which the Attorney General had objected under section 5 is never to be invalidated by the federal courts so long as that change subsequently receives preclearance?

Parties

The appellants in this action are the National Association for the Advancement of Colored People, Inc., the Hampton County, South Carolina Branch of the National Association for the Advancement of Colored People, Inc., Benjamin Brooks, Jack J. DeLoach, Jessie M. Taylor, Rev. Ernest McKay, Sr., Soletta Taylor, Jesse Lee Carr, W.M. Hazel, John Henry Martin, Washington G. Garvin, Jr., Dora E. Williams, James Fennell, Vernon McQuire, Bossie Green and Earl Capers.

The appellees in this action are:

(1) The Hampton County Election Commission and its members, Randolph Murdaugh, III, Richard Sinclair, James Wooten, and W.H. Smith,

(2) The Hampton County School District No. 1 and its trustees, Philip Stanley, Lenon Brooker, Rebecca Badger, Wiley Kessler and Gerald Ulmer,

(3) The Hampton County School District No. 2 and its trustees, T.M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon, and Lee Manigo,

(4) Willingham Cohen, Sr., Marcia Woods, Louise Hopkins, Charlie Crews and William Bowers, the members of the Hampton County Council, and

(5) Wilson P. Tuten, Jr., the Hampton County Treasurer.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	ii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
The Questions Are Substantial	7
Conclusion	18
APPENDIX—	
Order of the District Court, September 9, 1983	1a
Notice of Appeal	12a
Votings Rights Act of 1965, Section 5	14a
Act No. 547, South Carolina Laws (1982)	17a
Act No. 549, South Carolina Laws (1982)	19a

Table of Authorities

Cases: PAGE

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 8, 9, 11, 12, 13, 14, 15-16, 17

Berry v. *Doles*, 438 U.S. 190 (1978) 8, 14, 15

Blanding v. *Dubose*, 454 U.S. —— (1982) 17

Canady v. *Lumberton Board of Education*, —— U.S. —— (1982) 17

City of Rome v. *United States*, 446 U.S. 156 (1980) 9, 12

Connor v. *Waller*, 421 U.S. 656 (1975) 10

Dougherty County v. *White*, 439 U.S. 32 (1978) 9, 10, 16

Georgia v. *United States*, 411 U.S. 526 (1973) 13

Hadnott v. *Amos*, 394 U.S. 358 (1969) 9

Hicks v. *Miranda*, 422 U.S. 332 (1975) 17

McCain v. *Lybrand*, No. 82-282 17

Perkins v. *Matthews*, 400 U.S. 379 (1971) 11, 14, 16

United States v. *Board of Supervisors*, 429 U.S. 642 (1977) 16

United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978) 12, 13

Whitely v. *Williams*, 393 U.S. 544 (1969) 9

Statutes and Constitutional Provisions:

28 U.S.C. § 1253 2

28 U.S.C. § 2101(b) 2

42 U.S.C. § 1973c ..... *passim*

PAGE

Voting Rights Act of 1965, § 2 ..... 6n

Voting Rights Act of 1965, § 5 ..... *passim*

Act 547, South Carolina Laws (1982) 2, 3, 5

Act 549, South Carolina Laws (1982) ..... *passim*

Regulations:

28 C.F.R. § 51.12(g) 9

28 C.F.R. § 51.20 4

Rules:

Rule 6(a), Federal Rules of Civil Procedure 2n

Supreme Court Rule 12.1 2

Supreme Court Rule 29.1 ..... 2n

Reports:

S.Rep. No. 97-417 15

H.R. Rep. No. 97-227 15

U.S. Constitution:

Fourteenth Amendment 6n

Fifteenth Amendment 6n

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

Appellants National Association for the Advancement of Colored People, etc., *et al.*, appeal from the order of September 9, 1983, of the three-judge United States District Court for the District of South Carolina denying injunctive relief and dismissing the complaint in this action insofar as it sought relief under section 5 of the Voting Rights Act of 1965.

Opinion Below

The opinion of the district court of September 9, 1983, which is not reported, is set out at pp. 1a-11a of the appendix hereto.

Jurisdiction

The order of the three-judge district court, denying injunctive relief and dismissing the complaint insofar as it sought relief under section 5 of the Voting Rights Act, was entered on September 9, 1983. (App. 1a). A timely notice of appeal was filed on October 10, 1983.[1] (App. 12a). See 28 U.S.C. § 2101(b). On December 7, 1983, the Chief Justice extended the date for docketing this appeal until December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Statutes Involved

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set out at pp. 14a-16a of the appendix hereto. Acts 547 and 549 of the South Carolina Laws of 1982 are set out at pp. 17a-18a and pp. 19a-21a of the appendix.

Statement of the Case

From prior to 1964 until 1982 the Hampton County public school system was controlled by the Hampton County Board of Education. During this period the six members of the County Board were appointed by the Hampton County members of the South Carolina legislature. The school system was in turn divided into two school districts with separate Boards of Trustees, whose members were appointed by the County Board. Over 91% of all white public school students in the county attend the schools

[1] The thirtieth day after September 9, 1983, was a Sunday, October 9, 1983. Accordingly, the notice of appeal was due on October 10, 1983, the date on which it was filed. Rule 6(a), Federal Rules of Civil Procedure; Supreme Court Rule 29.1.

in District No. 1, while the student population of the District No. 2 schools is 92% black. Each school district has operated autonomously under the general supervision of the County Board and of an elected County Superintendent of Education.

On February 18, 1982, the South Carolina legislature enacted Act 547, which provided that, beginning January 1, 1983, the six members of the County Board were to be elected rather than appointed. The Superintendent of Education, while continuing to be elected at-large, was to serve as a seventh voting member of the newly constituted County Board. The first elections for the new County Board were to be conducted in November, 1982. The purpose for electing the County Board members, rather than appointing them, was apparently to create a County Board responsive to consolidating School Districts Nos. 1 and 2. Act 547 was promptly submitted to the United States Attorney General for preclearance under section 5 of the Voting Rights Act, and received that preclearance on April 28, 1982.

The adoption of Act 547, however, provoked substantial opposition among the white residents of District No. 1. According to the complaint, those whites circulated a petition calling for the abolition of both the County Board and the position of County Superintendent of Education, thus severing the connection between Districts One and Two. As a result of that petition, and with the backing of the Hampton County Council, a white member of the county legislative delegation introduced legislation to overturn Act 547. This new measure was enacted on April 9, 1982 as Act 549. Act 549 abolished the Hampton County Board of Education and the position of Hampton County Superintendent of Education. It provided that their duties were to be assumed by the Trustees of School Districts 1 and 2. Beginning in November, 1982, the Trustees of those school

districts were to be elected at-large at the general election. Act 549 provided that candidates for election to these newly reconstituted school boards were to file with the county Election Commission between August 16 and 31, 1982. Implementation of Act 549, however, required approval of a referendum of Hampton County voters to be conducted in May, 1982.

When Act 549 was adopted there was ample time, a total of 129 days, to obtain preclearance before the scheduled filing period was to begin on August 16. But although Department of Justice regulations expressly authorized consideration of a preclearance request prior to the holding of any necessary referendum, 28 C.F.R. § 51.20, no effort was made to submit Act 549 during either April or May of 1982. When the necessary referendum approved Act 549 on May 25, 1982, there remained sufficient time, 83 days, in which to obtain preclearance prior to the commencement of the filing period. But state and local officials delayed still further. Not until June 24, 1982, some 30 days later, was the necessary submission received by the United States Attorney General; by then the time remaining until the statutory filing period was to begin was less than the 60 days normally required for preclearance under section 5.

As a result of these delays, the Attorney General had taken no action on Act 549 when the filing period for elections under that Act commenced on August 16, 1982. Despite the fact that section 5 of the Voting Rights Act forbids any implementation of a new election practice or procedure which lacks preclearance, Hampton County election officials, who were well aware of the requirements of federal law, began to accept petitions for candidates seeking election in the new districts created by Act 549. On August 23, 1982, the Attorney General objected to Act 549 insofar as it abolished the County Board. Despite this

objection, Hampton County officials continued to implement the Act 549 filing period. On September 1, 1982, after that filing period had ended, county officials submitted to the Attorney General a request for reconsideration of his objection. They also began for the first time to accept filings for election under Act 547, the only law which then had the necessary preclearance. On November 2, 1982, having received no response to their request for reconsideration, county election officials held elections for the County Board under Act 547. Of the six board members elected on that date, three were black and three were white.

On November 19, 1982, the Attorney General withdrew his objection to Act 549. On November 29, 1982, the chairman of the Hampton County Election Commission wrote the South Carolina Attorney General and requested his opinion on three questions:

(1) Should an election be held to elect Trustees for Hampton County School Districts 1 and 2?

(2) If so, when should such an election be held?

(3) Should the filing period for the respective District Boards of Trustees be "reopened"?

The state Attorney General responded on January 4, 1983, advising the County that it should hold new elections "[a]s soon as possible" and that it need not "reopen" the filing period. Acting on this advice, the Hampton County Election Commission conducted elections in Districts 1 and 2 on March 15, 1983. The six individuals elected in November, 1982, to the County Board of Education were never permitted to take office.

The advice given by the state Attorney General and acted upon by the county had two distinct effects of im-

portance to this litigation. First, although the express language of Act 549 authorized election of District Trustees only during a general election, the Trustees were in fact chosen at a special off-year election. Second, despite the fact that Act 549 contemplated that the filing period would begin several months after the Act went into effect, the filing period for the 1983 election in fact closed more than two months *before* the statute became effective. The only time at which candidates for District Trustee were permitted to file for that office was when the conduct of such filings was illegal under section 5 of the Voting Rights Act.

The appellants, two civil rights organizations and several residents of Hampton County, commenced this action in the United States District Court for the District of South Carolina seeking an injunction to forbid the proposed elections as illegal under section 5 of the Voting Rights Act,[2] and to place in office the duly elected members of the County Board of Education. Appellants alleged that the proposed elections violated section 5 because they were to occur at a time other than that provided for in Act 549, and because the elections were limited to candidates who had filed for election during the illegal August 1982 filing period.[3] A three judge court was convened to hear the case, as required by 42 U.S.C. § 1973c. Appellants unsuccessfully sought to enjoin the March 15, 1983, special election. Subsequently, on September 9, 1983, the district court denied appellants' request for injunctive relief and dismissed their complaint insofar as it sought to state a claim under section 5 of the Voting Rights Act.

[2] The complaint also alleged that the Election Commission, in violation of section 3 of Act No. 549, had failed to certify to the South Carolina Code Commissioner the results of the May 1982 referendum. Although we disagree with the district court's reasons for rejecting this claim, our review of the record indicates that that certification was in fact made. Accordingly, we do not seek review of the district court's denial of injunctive relief regarding the alleged lack of certification.

[3] The complaint also alleged that the abolition of the elected County Board of Education violated section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. These claims were not dismissed, and are the subject of continuing litigation in the district court.

The Questions Presented Are Substantial

This case presents yet another attempt on the part of a jurisdiction subject to section 5 of the Voting Rights Act to avoid compliance with the provision's requirement that no alteration in any election practice or procedure be implemented until and unless precleared by the Attorney General of the United States or the United States District Court for the District of Columbia. The voting changes involved in this appeal took place in connection with an election for school trustees, which was held under new procedures which either lacked preclearance under the Voting Rights Act or had in fact been objected to by the Attorney General. The district court, in denying any injunctive relief, created no less than four new exceptions to the requirements of section 5. The decision below, if upheld by this Court, would substantially impair the scope and effectiveness of section 5, and seriously interfere with the ability of the Attorney General to carry out his administrative responsibilities under the Voting Rights Act.

This case arose, quite simply, because the appellees ignored section 5 not once but several times in the course of changing the system of selecting school boards in Hampton County. First, the implementation of the new statute, Act 549, was begun without the required preclearance, and continued even after an objection had been entered by the Attorney General. Following an interlude of compliance during which implementation stopped and a scheduled elec-

tion was canceled, the violations began anew after the Attorney General withdrew his section 5 objection to Act 549. At that point the appellees proceeded to set a new election and to adopt election procedures different from those in the text of Act 549, without any effort to preclear these new changes. Finally, in conducting the new election the appellees barred from the ballot all candidates except those who had filed under Act 549 at a time when the conduct of a filing period under Act 549 was clearly illegal under the Voting Rights Act. One of the would be candidates rejected because of a failure to participate in this illegal filing period was the chairman of the about to be abolished County Board of Education, who wished to run for a seat on one of the trustee boards which was to replace his office.

The first election law change which has never received preclearance under section 5 is an alteration of the date for conducting the initial election of the trustees of the local school boards. Section 1(b) of Act 549, as earlier approved by the Attorney General, authorized the election of district trustees only at the "general election" held in November of even-numbered years in South Carolina. A state statute altering the election date from the general election to March of an off-year would clearly have been a change in a "standard, practice or procedure with respect to voting . . . " 42 U.S.C. § 1973c. This Court has repeatedly held that Congress intended section 5 "to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969). In *Berry* v. *Doles*, 438 U.S .190 (1978), this Court held that section 5 applied to a state statute changing the time at which certain Georgia county officials were to be elected. Such a change in the timing of an election has an obvious potential adverse impact on the number of minority voters participating when, as here,

the election is moved from a regular general election to a special election, since voter turnout at special elections is predictably lower. In the instant case, for example, over 6000 Hampton County voters participated in the November 1982 general election,[4] while less than half that number voted in the March 1983 special election.

Second, the procedures adopted by appellees effectively constituted a change in the candidate filing rules. Act 549, as approved by the Attorney General, authorized only two filing periods, the August 16-31 period for a contemplated November, 1982, school board election, and the usual filing period for subsequent school board elections. The Act neither established any filing period for a March 1983 special election, nor sanctioned the use of the August 1982 filings for any election other than that to occur in November, 1982. This Court has repeatedly held that such candidate qualification rules are subject to section 5. *City of Rome* v. *United States*, 446 U.S. 156, 160-61 (1980) (residence requirement); *Dougherty County* v. *White*, 439 U.S. 32 (1978) (mandatory leave for candidate in government job); *Hadnott* v. *Amos*, 394 U.S. 358 (1969) (filing requirements for independent candidates); *Whitely* v. *Williams*, 393 U.S. 544, 570 (1969) (filing requirements for independent candidates). The Justice Department section 5 regulations expressly require submission of "[a]ny change affecting the eligibility of persons to become candidates." 28 C.F.R. § 51.12(g). Submission of changes in such laws is required because candidate qualification rules may "undermine the effectiveness of voters who wish to elect . . . candidates" excluded by those rules. *Allen* v. *Board of Elections*, 393 U.S. at 570.

The filing rule at issue in this case to an extraordinary degree "burdens entry into elective campaigns and, con-

[4] Complaint, Exhibit 15-1.

comitantly, limits the choices available to voters." *Dougherty County* v. *White*, 439 U.S. at 40. The standard adopted in January 1983 for the March 1983 special election required prospective candidates to have filed no later than August 31, *1982*. By the time that that requirement was announced, the deadline it imposed was more than four months past. This unusual *ex post facto* requirement had an obvious discriminatory impact. First, the March special election was open only to candidates who had been willing to participate in the palpably illegal August 1982 filing, which had been conducted at a time when implementation of the statute involved violated section 5. Prospective candidates could only obtain a place on the March 1983 ballot by "obeying" in August 1982 election rules to which an objection had been interposed by the Attorney General and which under the Voting Rights Act were not and could not then have been "effective as laws." *Connor* v. *Waller*, 421 U.S. 656 (1975). Second, since only one black candidate[6] had filed for election as a trustee of District No. 1 during the illegal August 1982 filing period, the rule guaranteed white domination of that District regardless of the wishes of minority voters, and deprived those voters of any opportunity to vote for more than a single black candidate. Thus, had the decision to require an August, 1982 filing been contained in a state statute and submitted to the Attorney General, there was good reason to believe that he would have objected to it.

The district court nonetheless held that these new election procedures did not require preclearance under section 5, offering in support of its conclusion several different theories, each of which is, in our view, incompatible with the Voting Rights Act.

---

[6] Lenon Brooker. He was among the five candidates elected in March, 1983.

The district court reasoned, first, that once an election law is precleared, section 5 is simply inapplicable to any alterations in election procedures which occur in the implementation of that precleared law. Thus the new procedures involved in this case, it asserted, did not

> constitute "changes" within the meaning of Section 5. Each of these acts were not alterations of South Carolina law, but rather steps in the implementation of a new statute. . . . [T]he preclearance requirement of Section 5 applied to the new statute, Act No. 549, while the ministerial acts necessary to accomplish the statute's purpose were not "changes" contemplated by Section 5, and thus did not require preclearance. (App. 8a-9a).

On the district court's view, once Act 549 was precleared, Hampton County election officials were free to select any date for the trustee elections and to adopt any filing requirement, regardless of whether, as in fact occurred, the date and filing requirement were different than those in the Act submitted to and approved by the Attorney General of the United States.

Were that the rule, preclearance of any election law under section 5 would free state and local election officials to alter at will any other election practice or procedure that might be involved in the implementation of the precleared law. Such an exemption from the coverage of section 5, carrying with it an open invitation to evasion of the requirements of the Voting Rights Act, is clearly inconsistent with the intent of Congress "to give the Act the broadest possible scope." *Allen* v. *Board of Elections*, 393 U.S. at 567. This Court has consistently refused to create an exception to section 5 for purportedly "minor" changes made by local election officials, see e.g. *Perkins* v. *Matthews*, 400 U.S. 379 (1971), and the Attorney General

has properly insisted that even those technical changes in election procedures needed to implement longstanding election laws must be submitted for preclearance. *City of Rome* v. *United States,* 446 U.S. 156, 183 (1980).

The district court apparently applied this novel exception to section 5 in rejecting appellants' claim that the appellees had prematurely abolished the position of Superintendent of Education. Act 549 did abolish that position as of June 30, 1985, but plaintiffs complained that by mid-1983 the Superintendent had been stripped of his prior responsibility and authority.[6] The district court reasoned that since Act 549 had been precleared under section 5, "Section 5 does not reach this aspect of plaintiffs' complaint", despite the fact that abolition of that position was being implemented two years earlier than the particular date actually authorized by Act 549 and approved by the Attorney General.

The district court suggested, in the alternative, that the new election procedures at issue in this case had somehow "been precleared along with the . . . provisions of Act No. 549." (App. 9a). In particular the court asserted, apparently with regard to the illegal August 1982 filing period, that "the eventual preclearance of Act 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished." (App. 10a). But this Court has repeatedly rejected suggestions that the Attorney General be deemed to have approved changes in election procedures where those changes were not formally submitted to him in full compliance with the applicable section 5 regulations. *City of Rome* v. *United States,* 446 U.S. at 169 n. 6; *United States* v. *Sheffield Board of Commissioners,* 435 U.S. 110, 136 (1978); *Allen*

[6] Affidavit of John W. Dodge, Hampton County Superintendent of Education, dated July 13, 1983.

v. *Board of Elections,* 393 U.S. at 571. It is not sufficient that the Attorney General may have known of a proposed change; the responsible authorities must "in some unambiguous and recordable manner submit any legislation or regulation in question to the Attorney General with a request for his consideration pursuant to the Act." *Allen* v. *Board of Elections,* 393 U.S. at 571. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States* v. *Sheffield Board of Commissioners,* 435 U.S. at 136.

In the instant case the Attorney General could not possibly have evaluated or intended to approve the changes at issue when he withdrew his objection to Act 549, since that objection was withdrawn in November, 1982, and the decisions at issue—to hold a special election and to require candidates to have registered in August, 1982—were made in January 1983, two months *after* the Attorney General's action. If a decision by the Attorney General to preclear a new statute has the sweeping effect attributed to it by the district court, approving as well both premature implementing steps of which the Attorney General may be unaware, and subsequent implementation actions which he could not foresee, it would be impossible for the Attorney General to carry out his responsibilities under section 5 in an informed and conscientious manner. Under the best of circumstances "[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." *Georgia* v. *United States,* 411 U.S. 526, 540 (1973). But if the Attorney General cannot know in advance what implementing steps he is implicitly approving, it would be manifestly impossible to make the critical judgment which Congress contemplated.

In addition, the district court concluded that the November, 1982, preclearance of Act 549 *ipso facto* removed all taint of illegality from the August 1982 filing period. Relying on this Court's decision in *Berry* v. *Doles*, 438 U.S. 190 (1978), the court below held that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval." (App. 10a). In *Berry*, as in *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the issue before this Court was whether an election held without the necessary section 5 preclearance must be voided and conducted anew even though the changes at issue subsequently received the required preclearance. Neither case established a *per se* rule that such relief was never appropriate. *Perkins* held only that "[i]n certain circumstances" invalidation of an action taken in violation of section 5 might not be required, 400 U.S. at 396, and *Berry* merely found such circumstances to be present on the particular facts of that case. 438 U.S. at 192. Both cases recognized the desire of Congress to prevent the implementation of *all* election changes which had not received section 5 preclearance, not just those to which such preclearance would ultimately be denied.

Fourteen years ago, noting that the scope of section 5 raised "complex issues of first impression", this Court indicated a temporary reluctance to overturn elections conducted without preclearance. *Allen* v. *Board of Elections*, 393 U.S. at 572. In extending section 5 in 1982, however, Congress made clear its desire that the Voting Rights Act be strictly complied with. Congress amended the bailout provisions of the Act to ensure that exemption from coverage by section 5 not be accorded to jurisdictions which had violated that provision. The Senate Report emphasized:

> "[I]t is the Committee's intent that compliance with Section 5 means that even if an objection is ultimately withdrawn or the judgment of the District Court for the District of Columbia denying a declaratory judgment is vacated on appeal, the jurisdiction is still in violation if it had tried to implement the change while the objection or declaratory judgment denial was in effect." S.Rep. No. 97-417, p. 48.

Virtually identical language appears in the House Report, H.R. Rep. No. 97-227, p. 42. Both the House and Senate Reports include extensive references to the failure of covered jurisdictions to make the timely submissions required by section 5.

As Justice Brennan noted in his concurring opinion in *Berry*, in the absence of any credible threat that actions violative of section 5 will be invalidated by the federal courts, "the political units covered by § 5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes." 438 U.S. at 194. That is precisely what occurred in the instant case. The defendant election officials knowingly implemented Act 549 when it lacked section 5 preclearance, in the hope that such preclearance would eventually be obtained, and in the apparent belief that subsequent preclearance would immunize from redress that unlawful implementation. The district court's decision encourages precisely the sort of section 5 violation which concededly occurred in August 1982, and flies in the face of the clear intent of Congress.

Finally, the district court held that an allegation of "either racially discriminatory purpose or effect" was "essential to a Section 5 action." (App. 8a). This is a thinly disguised version of a construction of section 5 that has been repeatedly and unanimously rejected by this Court. In *Allen* v. *Board of Elections* this Court held:

> A declaratory judgment brought by the *State* pursuant to § 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a *private litigant* does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. 393 U.S. 558-59. (Emphasis in original).

In *Perkins* v. *Matthews*, 400 U.S. 410 (1971), the district court dismissed a section 5 action because it believed that the election law changes at issue lacked any discriminatory purpose or effect. This Court reversed:

> The three-judge court misconceived the permissible scope of its inquiry into [plaintiff's] allegations. . . . What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color." 400 U.S. at 383-85.

That rule has since been reaffirmed in *Dougherty County* v. *White*, 439 U.S. 32, 42 (1978) and *United States* v. *Board of Supervisors*, 429 U.S. 642, 645-46 (1977). Neither the evidence adduced in a private action to enforce section 5, nor the allegations of the complaint in such an action, are to be tested by standards which Congress has expressly reserved to a preclearance proceeding in the District Court for the District of Columbia or before the Attorney General.

The decision of the district court in this case is thus wholly at odds with both the intent of Congress in enacting the Voting Rights Act and the established construction of section 5. That decision is likely to encourage the problems of noncompliance with section 5 which have continued to engage this Court. *See, e.g., Blanding* v. *Dubose*, 454 U.S. —— (1982); *Canady* v. *Lumberton Board of Education*, —— U.S. —— (1982); *McCain* v. *Lybrand*, No. 82-282. Summary affirmance by this Court would require federal courts throughout the country to adhere to the ill-considered standards applied below, until and unless this Court directed otherwise. *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975). Summary affirmance would as a practical matter overrule, at least in part, virtually every section 5 decision handed down by this Court since *Allen* v. *Board of Elections*, and would wreak havoc in the implementation and administration of section 5. The questions presented by this appeal are as substantial as the decision of the district court is unsound.

CONCLUSION

For the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN R. HARPER II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(802) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

JACK GREENBERG
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

*Counsel of Record

APPENDIX

Order of District Court, September 9, 1983

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

Civil Action 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., etc., et al.,

Plaintiffs,

—versus—

HAMPTON COUNTY ELECTION COMMISSION, a public body politic; et al.,

Defendants.

On July 21, 1983, this case came before a three-judge district court for arguments on whether certain actions alleged by the plaintiffs constituted changes in election practice or procedure which had not received preclearance by the United States Attorney General, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973(c). It was conceded that if there had been no "change" within the meaning of Section 5, or if such change had been properly precleared, the portion of this action brought under Section 5 should be dismissed, and the three-judge court dissolved. After consideration of the arguments and memoranda of counsel, this court unanimously concluded that there had been no Section 5 changes accomplished without preclearance in this matter. For that

reason, the three-judge court dismissed the Section 5 portion of this case in an oral Order. The instant Order incorporates and memoralizes that earlier ruling from the bench.

The factual background of this action focuses upon the history of governance of the public school system of Hampton County, South Carolina. Since the provisions of Section 5 apply to departures from the voting standards, practices, or procedures that existed on November 1, 1964, that date becomes significant as the baseline against which Section 5 "changes" are measured.[1] Since well before that point, the Hampton County Public School System was controlled by the Hampton County Board of Education (the "County Board"), the Hampton County Superintendent of Education (the "Superintendent"), and the Boards of Trustees for School Districts One and Two (the "Trustees"). The six member County Board was appointed by the Hampton County Legislative Delegation. In turn, the County Board appointed Hampton County residents to serve as Trustees of the individual Districts, each trustee board having six members. A County Superintendent elected at large by the qualified voters of Hampton County served as an advisor to the teachers and trustees of each district. Each school district operated separately under the general supervision of district superintendents.

On February 18, 1982 the South Carolina General Assembly passed Act No. 547, Acts and Joint Resolutions,

[1] Section 5 requires South Carolina and its political subdivisions to obtain federal approval from the United States Attorney General or the United States District Court for the District of Columbia before enforcing any "practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

1982 (R311), which changed the government body for the Hampton County public school system. Beginning January 1, 1983, the County Board was to be composed of six at-large members, who were to be elected, rather than appointed. The Superintendent, while continuing to be elected at-large, was to serve as an *ex officio* County Board member, having all rights and privileges of other members including the right to vote. The purpose for electing the County Board members, as opposed to appointing them, was to create a County Board that would be responsive to consolidating School Districts One and Two. Act No. 547 was submitted by the South Carolina Attorney General to the United States Attorney General, who precleared it, pursuant to Section 5 of the Voting Rights Act, on April 28, 1982.

Act No. 547, however, was superseded by another piece of legislation, Act No. 549, Acts and Joint Resolutions, 1982 (R398). On April 9, 1982, the Governor of South Carolina signed Act No. 549, which abolished the Hampton County Board of Education and the Hampton County Superintendent of Education. Once these offices were abolished, their respective duties were to be assumed by the Trustees for School District One and Two.

Beginning with the November 1982 general election, the District One and Two Trustees were to be elected at-large, rather than appointed, by a plurality vote of the electors within each respective district. The number of Trustees serving on each board was reduced from 6 to 5. Act No. 549 stated that a candidate offering for election in November 1982 must file with the Hampton County Election Commission during the period August 16-31, 1982. Act No. 549 contains no language giving local election officials the authority to hold a filing period other than the one specified.

These changes in the school system's governing body were contingent upon approval by a majority of the qualified electors voting in a referendum in May 1982. Accordingly, the Hampton County Election Commission conducted a referendum on May 25, 1982. A majority of the voters approved Act No. 549. Therefore, by mandate of the voters of Hampton County, the offices of the County Board and Superintendent of Education were to cease to exist on June 30, 1982 and June 30, 1985, respectively.

As required by Section 5 of the Voting Rights Act, Act No. 549 was submitted to the United States Attorney General for preclearance on June 16, 1982. The next week, June 23, the sitting County Board members adopted an Order of Consolidation that consolidated Districts One and Two into a unitary school district. The following week, however, the same County Board voted to rescind its earlier Order of Consolidation.

Act No. 547 had already been precleared by the United States Attorney General. Thus, Act No. 549, in order to supersede Act 547, had to receive preclearance itself.

The situation was further complicated by the fact that the Attorney General is given 60 days to respond to a request for preclearance. In addition, the Attorney General may request additional information from the submitting authority. Such a request tolls the original 60-day period so that it does not start to run until the additional information is received. Thus it is possible that the submitting jurisdiction may have to wait for 120 days before it receives a response on preclearance.

When this fact is taken into account, there existed the chance that the filing period for candidates for District One and Two Trustees, August 16-31, would expire before the Attorney General precleared Act No. 549. If Act

No. 549 was precleared, pursuant to state law, it would supersede Act No. 547. But if preclearance came after August 31, Trustee elections could not be held as scheduled, because no candidate would have qualified by filing during the specified statutory filing period.

To avoid this potential dilemma, the Hampton County Election Commissioner began accepting Trustee filings on August 16, 1982. On August 23, 1982, a full 60 days after Act No. 549 was submitted, the Attorney General objected to a portion of Act No. 549. The Attorney General found neither a discriminatory purpose nor effect in the change of the method of selecting Trustees from appointment to election, but he was unable to conclude that the proposal to terminate the County Board was not discriminatory toward black Hampton County residents. The Attorney General noted, however, in his objection letter that the "Procedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection."

Because the Attorney General's objection was received in the middle of the filing period, the Hampton County Election Commission continued to accept filings until the end of August while Hampton County officials determined whether they would submit a request for reconsideration of the objection.

Hampton County submitted a request for reconsideration on September 1, 1982. Because there remained the chance that the request for reconsideration would be denied, the Election Commission also began accepting filings for the election of County Board members under Act No. 547. A candidate who had filed for the office of Trustee was also permitted to file for the County Board. As of November 1, 1982, the Attorney General had not responded

to the request for reconsideration. Accordingly, the Hampton County Election Commission held elections for County Board members on November 2, 1982.

Shortly thereafter, the Attorney General withdrew his objection to Act No. 549. In his letter of November 19, 1982, the Attorney General withdrew his objection to the abolition of the County Board because "a reappraisal of South Carolina law establish[ed] that the county board lacks authority to effect a consolidation and its abolition . . . will not have the potentially discriminatory impact we had initially perceived."

Once the Attorney General precleared Act No. 549, Act No. 547 became void. Even though the election for County Board members had been held in November 1982, Act No. 547 became a nullity when the Attorney General precleared Act No. 549.

Threafter, the Hampton County Election Commission prepared to hold elections for the Trustees of Districts One and Two. On November 29, 1982, Randolph Murdaugh, III, Chairman of the Hampton County Election Commission, wrote the South Carolina Attorney General and requested an Attorney General's opinion on the following three questions:

(1) Should an election be held to elect Trustees for Hampton County School Districts Nos. 1 and 2?

(2) If so, when should such an election be held?

(3) Should the filing for the respective District Board of Trustees be reopened?

The South Carolina Attorney General responded to these questions in a January 4, 1983 opinion. Referring to an earlier Attorney General opinion that the proposed consolidation of Districts One and Two was of no effect, the South Carolina Attorney General concluded that "the provisions of Act [No. 549] are now in effect and it requires that an election be held for the school trustees." In response to Mr. Murdaugh's question about the timing of such an election, the South Carolina Attorney General responded: "As soon as possible." Finally, regarding the question as to whether the filing period should be reopened, South Carolina's chief legal officer concluded that "there is no reason to reopen filing as only the date of the election has changed." Acting upon this legal advice, the Hampton County Election Commission published a Notice of Election setting March 15, 1983, as election day.[2]

From the foregoing chain of events, plaintiffs have identified five claimed Section 5 changes that they urge were enforced without proper preclearance by the Hampton County Election Commission. These alleged changes are as follows:

(1) conducting an election for Trustees without first certifying the results of the referendum to the South Carolina Code Commissioner as required by Section 3 of Act No. 549 (R398);

(2) accepting of filings for the Trustees' positions after the Attorney General objected to Act No. 549;

(3) (a) conducting an election for Trustees without first seeking authority for a filing period;

---

[2] Five Trustees were elected to the District Two Board on March 15, 1983, all of whom are black. One black person and four white persons were elected Trustees of District One.

(b) conducting an election for Trustees without holding a filing period subsequent to withdrawal of the Attorney General's objection;

(4) conducting an election for Trustees after the May, 1982, date specified for such elections in Act No. 549; and

(5) the abolition of the office of the Hampton County Superintendent of Education and the devolution of his duties on the Trustees of Hampton County School Districts One and Two.

In this court's view, plaintiffs' first contention does not involve a change in voting practice or procedure within the meaning of Section 5. Even though Section 3 of Act No. 549 (R398) required certification of the results of the referendum by the county election commission to the county legislative delegation and the South Carolina Code Commissioner, the failure of the election commissioner to so certify is purely a state law problem. Moreover, the failure of the election commissioner to certify the referendum results to the code commission is not alleged to have had either racially discriminatory purpose or effect. Such an allegation is essential to a Section 5 action. Otherwise, federal courts "would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Powell* v. *Power*, 436 F.2d 84, 86 (2d Cir. 1970).

Plaintiffs' second, third and fourth alleged changes also fail to constitute "changes" within the meaning of Section 5. Each of these acts were not alterations of South Carolina law, but rather were steps in the implementation of a

new statute. It is not questioned that Act No. 549 constituted a Section 5 "change" that require preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not "changes" contemplated by Section 5, and thus did not require preclearance.

Even if plaintiffs' second, third and fourth alleged changes were to be considered as "changes" under Section 5, this court concludes that they have now been precleared along with the remaining provisions of Act No. 549. The fact that the eventual preclearance of Act No. 549 followed the filing period for the Trustees' positions is not a bar under Section 5. In *Berry* v. *Doles*, 438 U.S. 190 (1978), the Supreme Court recognized the necessity of taking a practical approach toward reducing the disruptive delays frequently generated by requests for preclearance. The Court in *Berry* was confronted with a Section 5 challenge to a change in a Georgia statute regulating voting procedures for the election of the members of the Peach County Board of Commissioners of Roads and Revenues. The *Berry* case was filed four days prior to the contested election, and the election was held as planned. The three-judge district court held that the change, which had not been precleared at the time of the election, violated Section 5, but refused to set aside the election. On appeal, the Supreme Court affirmed the finding of a Section 5 violation, but reversed the denial of affirmative relief regarding the election. The Supreme Court concluded that the

appropriate remedy was to permit the responsible officials to have 30 days within which to apply pursuant to Section 5 for approval of the change in question. Citing *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the Court noted as follows:

> We indicated in [*Perkins*] that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." 400 U.S., at 396-397. The circumstances present here make such a course appropriate.
>
> In this case, appellees' undisputed obligation to submit the 1968 voting law change to a forum designated by Congress has not been discharged. We conclude that the requirement of federal scrutiny imposed by §5 should be satisfied by appellees without further delay. . . . If approval is obtained, the matter will be at an end.

438 U.S. at 192-193.

By its decision in *Berry*, the Supreme Court clearly indicated that a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval. Thus, it is the court's view that in the case at bar the eventual preclearance of Act No. 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished.

The fifth and final change asserted by the plaintiffs, the abolition of the office of Hampton County Superintendent of Education and the devolution of his duties on

the Trustees, was provided for by Act No. 549.[1] As indicated in the preceding discussion of the second, third, and fourth alleged changes, this action was approved when the Act itself was precleared by the Attorney General. Thus, Section 5 does not reach this aspect of plaintiffs' Complaint.

For the reasons set forth above, the court concludes that the five instances alleged by the plaintiffs do not represent changes in election practice or procedure within the meaning of Section 5 of the Voting Rights Act of 1965 which were instituted without preclearance by the Attorney General. Further, the alleged changes have in fact been ratified and approved by the United States Attorney General's eventual preclearance of Act No. 549 in its entirety. Therefore, the court denies plaintiffs' request for injunctive relief and dismisses those portions of the Complaint which seek any relief from this three-judge court under Section 5 of the Voting Rights Act of 1965.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN
Robert F. Chapman
United States Circuit Judge

/s/ CHARLES E. SIMONS, JR.
Charles E. Simons, Jr.
United States District Judge

/s/ FALCON B. HAWKINS
Falcon B. Hawkins
United States District Judge

---

[1] The Hampton County Superintendent of Education was elected for a four-year term commencing July 1, 1981 and expiring June 30, 1985. Act No. 549 abolishes this position effective June 30, 1985.

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

Filed October 10, 1983

Civil Action No. 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ETC., ET AL.,

Plaintiffs,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Defendants.

Plaintiffs National Association for the Advancement of Colored People, Inc., Hampton County, South Carolina, Branch of the National Association for the Advancement of Colored People, Inc., Benjamin Brooks, Jack J. Deloach, Jessie M. Taylor, Rev. Ernest McKay, Sr., Soletta Taylor, Jesse Lee Carr, W. M. Hazel, John Henry Martin, Washington G. Garvin, Jr., Dora E. Williams, James Fennell, Vernon McQuire, Bosie Green and Earl Capers, hereby appeal to the Supreme Court of the United States from the order of the District Court denying injunctive relief on the claims based upon 42 U.S.C. Section 1973c entered in this case on September 9, 1983. This appeal is taken

Notice of Appeal

pursuant to 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

/s/ JOHN R. HARPER II
JOHN R. HARPER II
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

Columbia, South Carolina

October 10, 1983.

Voting Rights Act of 1965, Section 5

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, provides:

> § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court
>
> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting

> different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submis-

sion, the Attorney General may reserve the right to reexamine the submisson if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Act No. 547, South Carolina Laws (1982)

Act No. 547, South Carolina Laws 1982, provides:

Composition of Hampton County Board of Education

SECTION 1. Notwithstanding any other provision of law, beginning January 1, 1983, the Hampton County Board of Education shall be constituted and elected as follows:

A. (1) Six members shall be elected at large from the county in an election conducted by the county election commission at the time general elections are held beginning with the general election of 1982.

(2) To have his name placed on the ballot a person must file with the election commission, not less than forty-five days before the election, a petition signed by not less than fifty qualified electors of the county. Each signature shall be followed by the voter registration number of the petitioner. Petitions must be approved by the county board of voter registration.

(3) No political party designation shall appear on the ballot in connection with the names of candidates.

(4) The six candidates receiving the highest vote in the election shall be declared elected. In the event of a tie vote, procedures provided in the state election laws shall apply.

B. Terms of members shall be for four years and until their successors are elected and qualify except that in the initial election of 1982 the three members elected who receive the smallest vote shall serve initial terms of two years only.

C. Vacancies shall be filled in the next general election for a full term or unexpired term as the case may

be except that if a vacancy occurs more than one year prior to a general election it shall be filled by appointment by the Governor upon recommendation of a majority of the county legislative delegation for a period until the vacancy can be filled by election.

D. In addition to the elected members, the county superintendent of education shall serve *ex officio* as a member of the board and in such capacity shall have all rights and privileges of other board members, including the right to vote.

E. As of December 31, 1982, the terms of all board members then serving shall expire.

F. Except as provided in this act the powers, duties and procedures of the board as prescribed by law shall continue in full force and effect.

Time effective

SECTION 2. This act shall take effect upon approval by the Governor.

Act No. 549, South Carolina Laws (1982)

Act No. 549, South Carolina Laws, provides:

Board of education abolished, trustees elected

SECTION 1. Contingent upon approval of the total proposal by a majority of the qualified electors voting in a referendum to be held in May, 1982, as hereafter provided for, the following shall occur:

(a) The Hampton County Board of Education shall be abolished at midnight on June 30, 1982; the office of the Hampton County Superintendent of Education shall be abolished at midnight on June 30, 1985; upon abolition their respective duties shall devolve upon the trustees for Hampton County School Districts Nos. 1 and 2; and after June 30, 1982, the Hampton County Treasurer shall pay any proper claim approved by a majority of the trustees of either School District No. 1 or School District No. 2, on behalf of their respective districts, provided sufficient funds are on deposit in the proper district account.

(b) Beginning with the general election in November, 1982, trustees for Hampton County School Districts Nos. 1 and 2 shall be elected by a plurality vote of the electors within their respective district qualified and voting at the general election for representatives. The number of trustees shall be five for each school district and their terms of office shall begin January 1, 1983. The three candidates in each district receiving the highest number of votes shall serve for terms of four years and the remaining two trustees shall have initial terms of two years, after which all terms shall be for four years. In each case trustees shall serve until their successors are elected and qualify

and each school board shall elect its chairman annually. Trustees shall receive no salary but shall be reimbursed for actual expenses incurred. A candidate for membership on a school board must reside in the school district he seeks to represent and all candidates offering for election in November, 1982, must file during the period August 16-31, 1982.

Referendum conducted

SECTION 2. The Hampton County Commissioners of Election shall conduct a referendum within the respective county school districts during May, 1982, to determine whether the provisions of Section 1 of this act shall be implemented. The specific date for the referendum shall be determined by the county election commission. The county election commission shall thrice publish notice of the referendum in a newspaper of a countywide circulation, the last publication to be not less than one nor more than two weeks before the referendum. All election laws contained in Title 7 of the 1976 Code applicable to county referendums shall apply. Ballots shall be prepared and distributed to the various voting precincts of the county with the following printed thereon:

"Shall the Hampton County Board of Education be abolished on June 30, 1982, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; shall the office of the Hampton County Superintendent of Education be abolished on June 30, 1985, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; and shall the trustees for Hampton County School Districts Nos. 1 and 2 (five trustees per district), rather than being appointed, be elected by plurality vote during general elections for representatives beginning with the election in Novembr, 1982, with their terms to begin January 1, 1983, and with terms of office to be four years, except that of those initially elected two from each district shall have initial terms of two years?

I agree to the above proposals ☐ Yes ☐ No

Place a check or cross mark in the block which expresses your answer."

Results certified

SECTION 3. The Hampton County Commissioners of Election shall certify the results of the referendum directed in Section 2 of this act to the Hampton County Legislative Delegation and to the South Carolina Code Commissioner.

Supreme Court, U.S.
FILED
JAN 21 1984
STEVAS

(2)

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,
Appellants,
v.
HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

T. TRAVIS MEDLOCK
Attorney General

TREVA C. ASHWORTH*
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

Attorneys for Appellees Hampton County Election Commission, Its Members, Hampton County Treasurer

*Counsel of Record

BEST AVAILABLE COPY

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,
Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH*
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

Attorneys for Appellees
Hampton County Election
Commission, Its Members,
Hampton County Treasurer

*Counsel of Record

TABLE OF CONTENTS

	PAGE
Jurisdiction.....	1
Statement.....	2
Argument.....	7
Conclusion.....	26

Appendix -

Hearing before the Honorable Charles E. Simons, Jr., Chief District Judge, May 14, 1983..... 1a

TABLE OF AUTHORITIES

Cases: Page

Berry V. Doles, 438 U.S. 190 (1978)..... 16

Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982)..... 21

Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979)..... 15

Georgia v. United States, 411 U.S. 526 (1973).....14, 20, 21

Heggins v. City of Dallas, Tex., 469 F. Supp. 739 (N.D. Texas (1979).....14, 21

Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981).....13, 21

Moore v. Leflore Cty. Bd. of Election Comm'rs., 351 F. Supp. 848 (N.D. Miss. 1971)..... 14

United States v. County Comm'n, Hale Cty, Ala., 425 F. Supp. 433 (S.D. 1976)..... 14

United State v. Sheffield Board of Commissioners, 435 U.S. 110 (1978)..... 15

Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970)..... 14

Page

Statutes and Constitutional Provisions:

42 U.S.C. 1973(c)..... 14

Voting Rights Act, §2..... 7

Voting Rights Act, §5..... 7

Act 547, South Carolina Laws (1982).....passim

Act 549, South Carolina Laws (1982).....passim

Rules:

Supreme Court Rule 16(1)(c) and (d)..... 1

U. S. Constitution:

Fourteenth Amendment..... 7

Fifteenth Amendment..... 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1)(c) and (d) of the Supreme Court of the United States, appellees, Hampton County Election Commission and its members Randolph Murdaugh, III, Richard Sinclair, James Wooten and W. H. Smith, and the Hampton County Treasurer, Wilson P. Tuten, Jr., move the Court to dismiss the appeal herein or, in the alterna-

tive, to affirm the Order of the District Court on the grounds that it is manifest, that the decision below was clearly correct and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

For the purpose of this Motion only, these Appellees assume, without conceding, the Court's jurisdiction herein.

STATEMENT OF CASE

Prior to 1982 Hampton County had an appointed six member County Board of Education. The County was also divided into two school districts which were each governed by a six member Board of Trustees who were appointed by the County Board of Education.

On February 18, 1982, Act 547 was enacted by the South Carolina General Assembly. This Act provided that beginning with the general election in 1982, the Hampton County Board of Education would be composed of six members elected at large. On February 24, 1982, this Act was submitted to the Justice Department for Voting Rights Review and on April 28, 1982 the Justice Department entered no objection to the Act.

Following the enactment of Act 547, but before the Justice Department entered no objection to the Act, the General Assembly enacted a new law regarding the Hampton County education system, Act 549, which, when precleared by the Justice Department, would supersede Act 547. This Act provided for a referendum to be held to decide if the

county wanted to abolish the County Board of Education and the Hampton County Superintendent of Education and have their duties devolve upon the trustees for School District One and Two who would be elected. This Act further reduced the number of Trustees in each district from six to five and required that filing for these offices be held between the dates of August 16-31, 1982. This referendum was held and approved by the electorate. Once all the information for the submission was compiled, the Act was submitted to the Justice Department for preclearance on June 22, 1983.

In order to comply with state law requirements which mandated filing to be held during the period of August 16-31 and federal law requirements that

would prevent a state law from being put into effect if the Justice Department objected to the Act, the Hampton County Election Commission opened filing for officers for either election that might be held; i.e., the election of a County Board of Education pursuant to the provisions of Act 547, or the election of two Trustee Boards pursuant to the provisions of Act 549. The Justice Department did not respond until August 23, 1982, which was in the middle of the mandatory filing period for the offices provided for under the provisions of Act 549. On August 23, 1982, a letter was sent to the South Carolina Attorney General's Office stating that the Justice Department objected to Act 549. This letter was not received by the South Carolina Attorney General's

Office until August 26, 1983. It was then forwarded by mail to the members of the General Assembly who had sponsored the bill. By August 31, 1983, a letter had been sent to the Justice Department formally requesting reconsideration of their objection. On November 19, 1983, the objection was withdrawn. By this time elections required by the only Act then approved by the Justice Department, Act 547, had been required to be held. However, approval of Act 549 voided Act 547 as its provisions were superseded by Act 549.

An election was held on March 15, 1983, for the offices provided for by Act 549. All of the elected members of the District Two Board of Trustees are black. One of the five elected

members of the District One Board of Trustees elected is also black.

On March 11, 1983, this action was brought alleging violations of Section 5 and Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. On March 12, 1983, a Motion for a temporary restraining order was filed by the appellants in this case. This Motion was denied following a March 14, 1983 evidentiary hearing. On September 9, 1983 a three-judge court was convened and dismissed the complaint insofar as it sought to state a claim under Section 5 of the Voting Rights Act.

ARGUMENT

The District Court was manifestly correct in holding that the requirements of Section 5 of the Voting Rights Act

have been met in the instant case in that neither the State nor its political subdivision has sought to enforce a voting change that has not been precleared.

On August 16, 1983 the local officials in the Hampton County had before them an Act that had been precleared by the Justice Department that required a formally appointed County Board of Education to be elected. By the provisions of Act 547 filing for these offices had to be accomplished no later than forty-five days before the November 2 general election. Therefore, sometime in mid-September would be the last day a person could file for this office. On the other hand, there existed another Act, Act 549, which abolished this very Board and required the previously appointed Boards of Trustees to be elec-

ted in a general election. The act further mandated filing for these offices to occur during the designated dates of August 16-31, 1932. This Act had been submitted to the Justice Department in June but no action had at that date been taken on the submission.

In a good faith effort to comply with whatever election would ultimately be held, the Election Commission accepted filings for both offices. By newspaper articles and by communications with each person coming to file for office, they informed persons they should file for both elections because it was not clear which office would be precleared by the Justice Department. (App. 3a-10a). As the court noted in its Order, if filing had not been opened during this time period and

> [i]f Act 549 was precleared, pursuant to State law, it would supersede Act No. 547. But if preclearance came after August 31, Trustee elections could not be held as scheduled, because no candidate would have qualified by filing during the specified statutory filing period. (J.S. 4a-5a)

There is no question but that Act 549 contemplated the elections for the Boards of Trustees to be held in the November general election. If on August 23 the Justice Department had precleared Act 549, rather than initially objecting to the Act, the local officials would have been derelict in their duty if they had not been preceding with the preliminary filing procedures which would have allowed this election to proceed.

Allowing filing for an office does not constitute the enforcement of a change without preclearance. It is simply a preliminary step to an election

that was subsequently approved. If the Act had been disapproved, the filing would have been null and void. However, the Act was approved and, therefore, the filing was properly opened during the dates specified by the Act and those dates only.

The Justice Department has even taken the position in Court that merely preliminary steps to an election should be continued pending preclearance of a submitted change. In Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981) at footnote 11 the court notes that the United States Attorney General as amicus curiae had "...urged that... [the court] deny an injunction against the holding of the primary election on September 10, in hopes that pre-

clearance by the Attorney General will be forthcoming prior to the general election of November 3." 1/

The Justice Department has also been on record as retroactively approv-

---

1/ In the instant case the Appellants are alleging that the Appellees improperly allowed preliminary filing procedures before preclearance and that this should be found to violate 42 U.S.C. 1973(c). However, there have been many cases in which the courts have found that a questioned change was one that should have been precleared and yet even in the face of this finding authorized an election to proceed. United States v. County Comm'n, Hale Cty, Ala, 425 F. Supp. 433 (S.D. Ala. 1976), judg't aff'd, 430 U.S. 924 (1977); Moore v. Leflore Cty. Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971); Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970). See also Georgia v. United States, 411 U.S. 526 (1973). As stated in the dissent of Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 745-746 (N.D. Texas 1979):

> [a] reading of the cases reveals that enjoining an election for an indefinite time until preclearance is obtained is the exceptional remedy rather than the normal one. [cites omitted.]

objection from the Justice Department in some counties under plans that had not yet been precleared. All of this was done, as here, with the understanding that all of these procedures, the filing and primaries, were preliminary steps generally governed by statute as to date and if an objection was interposed to the submitted change, the procedural steps would also be void and unenforceable.

The Justice Department has even taken this position in Court. In Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981) at footnote 11 the court notes that the United States Attorney General as amicus curiae had "...urged that...[the court] deny an injunction against the holding of the primary election on September 10, in

hopes that preclearance by the Attorney General will be forthcoming prior to the general election of November 3." 1/

The Justice Department has also been on record as retroactively approv-

---

1/ In the instant case the Plaintiffs are alleging that the Defendants improperly allowed preliminary filing procedures before preclearance and that this should be found to violate 42 U.S.C. 1973(c). However, there have been many cases in which the courts have found that a questioned change was one that should have been precleared and yet even in the face of this finding authorized an election to proceed. United States v. County Comm'n, Hale Cty, Ala, 425 F. Supp. 433 (S.D. Ala. 1976), judg't aff'd, 430 U.S. 924 (1977); Moore v. Leflore Cty. Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971); Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970). See also Georgia v. United States, 411 U.S. 526 (1973). As stated in the dissent of Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 745-746 (N.D. Texas 1979):

> [a] reading of the cases reveals that enjoining an election for an indefinite time until preclearance is obtained is the exceptional remedy rather than the normal one. [cites omitted.]

ing changes that have already been implemented. In Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979), a suit was brought contesting the validity of registration of voters because the registration was conducted pursuant to laws that were implemented eight months before they were submitted to the United States Department of Justice for preclearance. The Court held that since the Justice Department had subsequently approved the changes and was aware of the fact registration had already occurred under the new laws, the city had satisfied the preclearance requirements of Section 5. Additionally, in United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978), the Town of Sheffield wrote the Justice Department that they wanted to hold a refer-

endum on whether or not the form of government should be changed. The referendum was held before the Justice Department responded. The Attorney General stated in his subsequent letter that he did not object to the referendum, that he was aware the referendum had been held and that since the voters had approved the change, the implementation of that change would also have to be submitted for preclearance.

In the case of Berry v. Doles, 438 U.S. 190 (1978), this Court recognized this principle when the Court upheld a three-judge Court that had allowed an election to stand even though the change had not received preclearance. The Court found that the change should, however be submitted and "[i]f approval is obtained, the matter will be at an end."

Berry, supra at 193.

The Appellees would submit that this same principle of retroactive approval is applicable in the instant case and should be applied to the Appellants' allegations regarding filing while the Act was being considered twice by the Justice Department; and, therefore, the issue is moot. 2/

2/ The appellants further argue that filing was ineffective from August 23, 1982, when the Justice Department entered their original objection to Act 549. Appellees would assert that the letter of objection was not received by the South Carolina Attorney General's Office until August 26, 1982 and was then forwarded by mail to the Representative who introduced the bill. On August 31, the last day of the filing period, a letter was sent officially requesting reconsideration of the objection. The request for reconsideration kept open the possibility that Act 549 might eventually be approved thereby necessitating the continuation of filing. Additionally, the Chairman of the Hampton County Election Commission has testified that he never received official notification that Act 549 had been objected to. (App. 9a-10a).

Likewise, there was no procedure or reason to re-open filing following preclearance from the Justice Department of the Act. The preliminary requirements of the Act to have filing from August 16-31, had been met and only the election date had been postponed while awaiting preclearance from the Justice Department.

Potential candidates had been repeatedly advised in newspaper articles and when coming in to file, to file for both races; i.e. the election that would be held under the provisions of either Act 547 or Act 549. (App. 4a-5a, 7a-9a). There was, of course, also the option of a write-in candidacy for anyone who failed to file during the statutory time period.

When the Justice Department precleared Act 549, they also precleared

the provision in the Act that required filing to be held August 16-31, 1982. If the local officials had suddenly, without authority, re-opened filing that would have been a change requiring pre-clearance. To have reopened filing would not only have been beyond the powers of the local officials, it would have affected the rights of those candidates who had filed during the statutory time limits established by the precleared Act.

Appellees further allege that pre-clearance should have been obtained prior to the change of the date of the elections provided for in Act 549 from November, 1982 to a subsequent time. 3/

3/ The effect of preclearing Act 549 was to moot the provisions of Act 547. These two Acts provided for two completed alternative forms of a governing body for the Hampton County School District. Once Act 547 was superseded by Act 549, its provision establishing a

In Georgia v. United States, 93 S.Ct. 1702 (1973), the Supreme Court stated that:

> ...it is important to focus on the entire scheme of §5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General 'merely gives the governed State a rapid method of rendering a new State election law enforceable.' [Cite omitted.] (Emphasis added.) Georgia, supra, 411 U.S. at 538.

The general language in Voting Rights Act cases is to the effect that

---

county board of education was null and void. There was no valid governing body for the school district because Act 549 abolished this board and required the trustees to be elected. This election by statute was to have taken place November, 1982. Therefore, the county was without a valid governing body for the school district and an election had to be held as soon as possible.

any future elections are enjoined unless and until the State receives Section 5 preclearance. Georgia, supra, 411 U.S. at 541; Herron, supra, at 176; Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 743 (N.D. Texas, 1979). In Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982) the Court stated that until preclearance was received on a congressional redistricting plan the election would be postponed "...until the earliest practicable date."

As stated in Georgia, supra, the purpose of providing an alternative procedure of submitting a change to the Justice Department was to provide for a rapid way of making a law enforceable. As many changes submitted for preclearance involve election dates, it would seem inconceivable that the Act envi-

sioned that every submission "freezing" an election date until approval by the Justice Department and which was not precleared until after the election date established by the Act, would require the General Assembly of the State to enact a new law establishing a new election date and submit it all over again for approval. This procedure could continue on ad infinitum if each approval would come after the date established by the law for the election. This procedure in itself would be a way of circumventing the Voting Rights Act and avoiding perhaps unpopular elections. In this case, the Justice Department did not remove their objection until November 19, 1982. Under Plaintiffs' rationale an election could not be held until the General

Assembly reconvened in January, enacted new legislation establishing a new election date for Hampton County, ratified the Act, and submitted it to the Justice Department for approval. If this was done for every Act that established election dates, the elections would be held years out of time with the present office holders holding over years past their term of office.

> As the District Court held:
> [i]t is not questioned that Act No. 549 constituted a Section 5 'change' that required preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not 'changes' contemplated by Section 5, and thus did not require preclearance.

Assembly reconvened in January, enacted new legislation establishing a new election date for Hampton County, ratified the Act, and submitted it to the Justice Department for approval. If this was done for every Act that established election dates, the elections would be held years out of time with the present office holders holding over years past their term of office.

> As the District Court held:
> [i]t is not questioned that Act No. 549 constituted a Section 5 'change' that required preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not 'changes' contemplated by Section 5, and thus did not require preclearance.

Appellants raise the argument of whether or not the district court correctly found that a racially discriminatory purpose or effect was a requirement of a Section 5 case. (J.S. 15). The Court discussed this only in passing and in connection with whether or not an alleged failure of the election commissioner to certify the results of the referendum was a change that should have been precleared. (J.S. 8a). The Appellants have conceded now in their brief, that the results were certified to the Code Commissioner. (J.S. 6, n2). Therefore, having abandoned this part of their appeal, we would submit that Appellants lack standing to now brief the question of whether or not the District Court was correct in its reasoning of this aspect of the case.

Appellants raise the argument of whether or not the district court correctly found that a racially discriminatory purpose or effect was a requirement of a Section 5 case. (J.S. 15). The Court discussed this only in passing and in connection with whether or not an alleged failure of the election commissioner to certify the results of the referendum was a change that should have been precleared. (J.S. 8a). The Appellants have conceded now in their brief, that the results were certified to the Code Commissioner. (J.S. 6, n2). Therefore, having abandoned this part of their appeal, we would submit that Appellants lack standing to now brief the question of whether or not the District Court was correct in its reasoning of this aspect of the case.

As to Appellants' argument regarding the office of Superintendent of Education and their allegation that the Superintendent's Office has been abolished without preclearance, the abolition of this office was a part of Act 549 and was approved when Act 549 was approved. This finding was the extent of the District Court's determination as to this allegation. (J.S. 10a-11a).

As to Appellants' argument regarding the office of Superintendent of Education and their allegation that the Superintendent's Office has been abolished without preclearance, the abolition of this office was a part of Act 549 and was approved when Act 549 was approved. This finding was the extent of the District Court's determination as to this allegation. (J.S. 10a-11a).

CONCLUSION

Wherefore, these Appellees respectfully submit that the decision below was clearly correct and that the questions upon which the cause depend are so unsubstantial as not to need further argument, and these Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment below without a hearing.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR HAMPTON COUNTY ELECTION COMMISSION
Murdaugh, Sinclair, Wooten, Smith; Hampton County Treasurer, Wilson P. Tuten, Jr.

CONCLUSION

Wherefore, these Appellees respectfully submit that the decision below was clearly correct and that the questions upon which the cause depend are so unsubstantial as not to need further argument, and these Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment below without a hearing.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR HAMPTON COUNTY ELECTION COMMISSION Murdaugh, Sinclair, Wooten, Smith; Hampton County Treasurer, Wilson P. Tuten, Jr.

APPENDIX

These portions of the Transcript of Record of the Hearing before the Honorable Charles E. Simons, Jr. are excerpted from the following pages of that Transcript: pp. 23-24; 26-28; 31-32; 37.

APPENDIX

These portions of the Transcript of Record of the Hearing before the Honorable Charles E. Simons, Jr. are excerpted from the following pages of that Transcript: pp. 23-24; 26-28; 31-32; 37.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION Civil Action No. 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ETC., ET AL.,

Plaintiffs,

vs.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Defendants.

H E A R I N G

BEFORE: The Honorable Charles E. Simons, Jr., Chief District Judge

May 14, 1983
Aiken, South Carolina

Appearances:

John R. Harper, II, Esq.
For the Plaintiffs

Charles H. Gibbs, Esq. and
Marvin Infinger, Esq.
For the defendant School Districts

A. G. Solomons, Jr., Esq.
For the defendant Hampton County Council

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION Civil Action No. 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ETC., ET AL.,

Plaintiffs,

vs.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Defendants.

H E A R I N G

BEFORE: The Honorable Charles E. Simons, Jr., Chief District Judge

May 14, 1983
Aiken, South Carolina

Appearances:

John R. Harper, II, Esq.
For the Plaintiffs

Charles H. Gibbs, Esq. and
Marvin Infinger, Esq.
For the defendant School Districts

A. G. Solomons, Jr., Esq.
For the defendant Hampton County Council

R A N D O L P H M U R D A U G H, I I I, called as a witness, and having been duly sworn by the Clerk, in answer to questions propounded, testified as follows,

to wit:

DIRECT EXAMINATION

BY MR. INFINGER:

Q. Mr. Murdaugh, state your name please?

A. Randolph Murdaugh, III.

Q. Are you a member of the Hampton County Election Commission?

A. I am.

Q. In what capacity?

A. I am the chairman of it.

Q. All right, sir. For how long have you been the chairman?

A. I've been the chairman probably for ten years. I've been on the

R A N D O L P H M U R D A U G H, I I I, called as a witness, and having been duly sworn by the Clerk, in answer to questions propounded, testified as follows,

to wit:

DIRECT EXAMINATION

BY MR. INFINGER:

Q. Mr. Murdaugh, state your name please?

A. Randolph Murdaugh, III.

Q. Are you a member of the Hampton County Election Commission?

A. I am.

Q. In what capacity?

A. I am the chairman of it.

Q. All right, sir. For how long have you been the chairman?

A. I've been the chairman probably for ten years. I've been on the

election commission probably for four-
teen. That's guesstimate.

* * * * * * * * * * * * * * * * * * * *

Thereafter, subsequent to the passage of the referendum, and prior to the November election, we began getting word that the Justice Department had interposed an objection to the referendum. And as the election got closer and closer, we got to the point to where we did not know what was happening. The -- I think, I might be wrong about this -- I think that the first word that I got was -- from it was from Mr. Kesler. He told me he had been informed of it. The -- I tried to find out something about it and couldn't. I finally called John Dodge our superintendent of education and he gave me a copy. My recollection is

that he gave me a copy of the first actual notice that I had that the objection had been interposed.

At the same time, they were trying to get Justice to reconsider their objection to it. The election commission was in a quandry as to what election to hold. So we thought that the best thing that we could do would be to have filing for the county -- the newly proposed elected county school board and to accept filing for the two individual district boards in accordance with the referendum. Then we would wait until the election got here and find out which election we could hold. And we did that.

There were at least two articles in the newspaper in which I gave an interview stating that. Everybody

that came into my office to file either under the limited filing of the referendum or under the general filing for the county board, I told them that we did not know which election we would hold, that if Justice kept its objection in, we would elect a county school board, if Justice withdrew their objection, we would elect the various -- the individual district boards.

The Justice did not withdraw their objection. We held a county school board election, certified the results of that. After the election of November the 2nd, I think it was, I'm not sure of the date, we learned again that Justice perhaps had withdrawn their objection. The first notice I got from that, I don't remember where it came

from, I finally got Johnny Linton, who represents one of the school boards to give me a copy of that letter. The election commission, there are five of us on the commission, and I talked with the commissioners, and as to what we should now do. We had a referendum that was not contrary, but limiting insofar as filing is concerned with the general law filing, that being that you had to file between the 16th and 31st of August, for the election.

* *

Q. All right, sir. Mr. Murdaugh, I want to ask you one more question. You had some earlier testimony about filing for both?

A. Yes, sir.

Q. Would you explain that again?

A. Yes sir. As I said, we had no

idea what election, and when I say we, I'm talking about the election commission, we had no idea what election we were going to hold. There was the bill, I think from January of that year, or some other time, the preceding bill enacting a county school board to be elected. We had the referendum that had passed in which Justice -- we had been informed, never been notified but had been informed that Justice was going to object to or had objected to.

So we --

THE COURT: That bill was approved on February 18th, '82.

THE WITNESS: That's the school board.

THE COURT: And this 398 was approved April the 9th, '82.

A. Yes sir. So what we figured

that the best thing we could do is let anybody file for any office that they wanted to of those three. In other words, if a man came in and wanted to file for north district number one, district board, we would tell him, we don't know what election is going to be held, we don't know whether we're going to elect district boards or whether we're going to elect a county board. You have a right to file for both of them. A number of people, in fact, that's most of the people, and I'm saying this without -- without looking it up factually, but I would say that the majority, I will put it that way, of the candidates that ran for county school board, did also file for one of the two district boards, depending on which geographical location they

lived in.

We told them that once we got to the point that we knew what was going to happen, that we would then tell them which office they were running for. And we did that.

* *

A. Let me tell you this way, sir, I knew that I wasn't going to hold, if what you are asking me, I knew I wasn't going to hold district elections unless Justice told me it was all right to do it. And I didn't hold it.

Q. But yet you continued to accept filings?

A. Yes sir, because you have got to bear in mind my testimony, I have never been officially notified of the Justice's objection. There was street talk going around Hampton. I finally

got a copy of the letter that Justice sent out from John Dodge when I called him up and asked him to tell me about it, sir. I have to this day, never been officially notified of it. I got a letter, and that's sufficient. I mean, I got enough sense to understand that if I held an election after reading that letter, that I would be doing something wrong.

No. 83-1015

Office - Supreme Court, U.S
FILED
JAN 23 1984
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

National Association for the Advancement of Colored People, et al.,

Appellants,

vs.

Hampton County Election Commission, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES HAMPTON COUNTY SCHOOL DISTRICT NO. 1, STANLEY, BROOKER, HUTTO, FREEMAN AND ULMER and HAMPTON COUNTY SCHOOL DISTRICT NO. 2, DIXON, ORR, JOHNSON, GORDON AND MANIGO

SINKLER GIBBS & SIMONS
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

ATTORNEY for Appellees
Hampton County School
District No. 1 and
its Trustees

Bruce E. Davis*
Post Office Box 881
Camden, SC 29020
(803) 432-2880

ATTORNEY for Appellees
Hampton County School
District No. 2 and
its Trustees

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Opinion Below.....	2
Jurisdiction.....	2
Statutes Involved.....	2
Statement.....	3
Argument:	
There is no substantial question presented.....	12
A. Certification of referendum results to South Carolina Code Commissioner.....	12
B. Opening of statutorily prescribed filing period pending preclearance.....	13
C. Conducting of election in March, 1983, instead of November, 1982, and without re-opening filing period.....	17
D. Abolishment of office of Hampton County Superintendent of Education and devolution of his duties on boards of trustees.....	21
Conclusion.....	23

TABLE OF AUTHORITIES

CASES:	Page
Allen v. State Board of Elections, 393 U.S. 544 (1969).....	23
Berry v. Doles, 438 U.S. 190 (1978).	16, 19
Georgia v. United States, 411 U.S. 526 (1973).....	13
Morris v. Gressette, 432 U.S. 491 (1977).....	22
Powell v. Power, 436 F. 2d 84 (2nd Cir. 1970).....	13
United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110 (1978).....	18
United States v. Georgia, C.A. No. C76-1531A (N.D. Ga. 1977), aff'd 436 U.S. 941 (1978).....	13
United States v. Saint Landry Parish School Board, 601 F. 2d 859 (5th Cir. 1979).....	13
White v. Dougherty County Board of Education, 439 U.S. 32 (1978)..	13

STATUTORY PROVISIONS:

South Carolina statutes at large

Act No. 547 of 1982 [62 STAT. 3495 (1982)].....	3,4,5,7, 9,10,15
Act No. 549 of 1982 [62 STAT. 3497 (1982)].....	passim

	Page
United States Code	
42 § 1973 c [§ 5, 1965 Voting Rights Act].....	passim
MISCELLANEOUS:	
Rule 16.1 (c) of the Rules of the Supreme Court of the United States.....	1
Rule 16.1 (d) of the Rules of the Supreme Court of the United States.....	1
28 C.F.R. § 51.19.....	7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

National Association for the Advancement of Colored People, et al.,

Appellants,

vs.

Hampton County Election Commission, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(c) and (d) of the Rules of the Supreme Court of the United States, the appellees Hampton County School District No. 1 and its Trustees, Philip Stanley, Lenon Brooker, Jerlyn Hutto, Miles Freeman and Gerald Ulmer and Hampton County School District No. 2 and its Trustees, T. M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon and Lee Manigo ("appellees Districts and Trustees" or "these appellees") move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge United States District Court for the District of South Carolina on

the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The order of the three-judge district court is set forth in the appellants' jurisdictional statement. J. S., App. 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement. J.S. 2.

STATUTES INVOLVED

Pertinent provisions of Section 5 of the Voting Rights Act of 1965 [42 U.S.C. § 1973c] are set forth in the appellants' jurisdictional statement. J.S., App. 14a.

The provisions of Acts Nos. 547 and 549 of the 1982 South Carolina General Assembly are also set forth in the jurisdictional statement. J.S., App. 17a and 19a.

STATEMENT

This appeal is from the order of the three-judge district court dated September 9, 1983, holding that the provisions of Act No. 549 of the 1982 South Carolina General Assembly have not been put into effect in violation of Section 5 of the Voting Rights Act and denying the appellants' request for injunctive relief.

Prior to November 1, 1964, and until the enactment of the 1982 legislation whose implementation is challenged by the appellants, the public school system of Hampton County was governed by the Hampton County Board of Education ("County Board"), the Hampton County Superintendent of Education ("Superintendent") and the boards of trustees of Hampton County School Districts Nos. 1 and

2 ("Boards of Trustees"). [1] The County Board was composed of six members and was appointed by the Hampton County members of the South Carolina Senate and the South Carolina House of Representatives. The County Board in turn appointed the six members of each of the two Boards of Trustees. The Superintendent was elected at large by the qualified voters of Hampton County and served as an advisor to the teachers and trustees of each district. Each school district operated separately under the general supervision of district superintendents.

Then, on February 18, 1982, the South Carolina General Assembly passed Act No. 547 of 1982, which changed the method of selection and the composition of the County Board. It provided for an elected County Board of six members elected at large from Hampton County beginning with the 1982 general

---

[1] Approximately 68% of Hampton County's public school students are black; District No. 1 students are 54% black and 46% white and District No. 2 students are 92% black and 8% white.

election. The Superintendent, while continuing to be elected at large, was to serve as an ex officio County Board member with all rights and privileges of other members, including the right to vote. Act No. 547 did not affect the composition or functioning of the two Boards of Trustees. The legislation was submitted by the South Carolina Attorney General to the United States Attorney General who precleared it under Section 5 of the Voting Rights Act on April 28, 1982.

Before Act No. 547 was approved, however, it was superseded by another piece of legislation, Act No. 549, [2/] which abolished the County Board as of June 30, 1983, and abolished the office of the Superintendent as of June 30, 1985. Once abolished, their respective duties were to be assumed and

---

[2/] The appellants' assertions in their Statement [J.S.3] as to the purpose of Act No. 547 and the reasons for the enactment of Act No. 549 were originally made in their complaint. They have been denied by the appellees and do not constitute facts in this appeal.

separately performed by the two Boards of Trustees. Beginning with the November, 1982, general election the Boards of Trustees were to be elected at large by a plurality vote of the electors within each respective district. The number of members of each board was changed from six to five. Act No. 549 provided that a candidate offering for election in November, 1982, had to file with the Hampton County Election Commission during the period August 16-31, 1982. It included no language giving local election officials the authority to open a filing period other than the one specified.

The changes to be effected by Act No. 549 were contingent upon approval by a majority of the qualified electors voting in a county-wide referendum in May, 1982. The referendum was conducted on May 25, 1982, and a majority of the voters approved Act No. 549. 3/ According to the mandate of the

---

3/ Over 46% of the registered voters in Hampton County voted in the referendum, which carried by a 55% affirmative vote.

voters of Hampton County, then, the County Board and the office of Superintendent were to cease to exist on June 30, 1982, and June 30, 1985, respectively.

As required by Section 5 of the Voting Rights Act, Act No. 549 was submitted to the United States Attorney General for preclearance on June 16, 1982. [4/] As stated earlier, Act No. 547 had already been precleared by the Attorney General and Act No. 549 likewise had to receive preclearance in order to be effective. The Attorney General's failure to preclear Act No. 549 would have rendered it unenforceable and would have revived the provisions of Act No. 547. On the other hand, if the Attorney General precleared Act No. 549, it would be the controlling piece

---

4/ The appellants characterize the local officials' action in submitting the referendum results as evidencing deliberate delay. J.S.4. Although the Department of Justice regulations authorize consideration of a preclearance request prior to the holding of an approving referendum, there are also sound reasons as well as authority for not making a submission of referendum results until "after [the changes] become final." 28 C.F.R. §51.19.

of legislation. Because the Attorney General is authorized to take as long as 120 days from the date of submission to perform his Section 5 review, there existed the possibility that the filing period for candidates for the two Boards of Trustees, August 16-31, 1982, might pass long before the Attorney General precleared Act No. 549. But if preclearance came after August 31, 1982, the first election for the Boards of Trustees could not be held as scheduled because no candidate would have qualified by filing during the specified filing period.

To avoid this situation, the Hampton County Election Commission began accepting filings on August 16, 1982. On August 23, 1982, a full 60 days after after Act No. 549 was submitted, the Attorney General objected to a portion of Act No. 549. Regarding the change in the method of selection from appointed to elected boards of trustees, the Attorney General found neither a discriminatory purpose nor effect. But the

Attorney General was unable to conclude that the abolishment of the County Board was not discriminatory toward Hampton County blacks. The Attorney General noted, however, in his objection letter that the "Procedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection."

Because the Attorney General's objection was received in the middle of the filing period and because a decision regarding whether or not to request reconsideration was pending, the Hampton County Election Commission continued to accept filings until the end of the statutorily prescribed period. Hampton County submitted a request for reconsideration on August 31, 1982. Nevertheless, because the possibility existed that the request for reconsideration would be denied, the Election Commission had also accepted filings for the elected County Board under Act No. 547. Any candidate who filed for one of the two Boards of Trustees was not

precluded from also filing for the County Board. As of November 2, 1982, the Attorney General had not responded to the request for reconsideration and, accordingly, the Hampton County Election Commission held the County Board election on that date.

Shortly thereafter, on November 19, 1982, the Attorney General withdrew his objection to the abolishment of the County Board because "a reappraisal of South Carolina law establish[ed] that the county board lacks authority to effect a consolidation and its abolition ... will not have the potentially discriminatory impact we had initially perceived." Despite the fact that the election for the County Board had already been held pursuant to Act No. 547, that legislation became a nullity when the Attorney General precleared Act No. 549.

Thereafter, the Hampton County Election Commission prepared to implement Act No. 549. It sought the advice of the South Carolina Attorney General as to whether or not an election should be held for the two Boards

of Trustees and, if so, the date of the election. It also sought advice as to whether or not the filing for the two Boards of Trustees should be re-opened.

The South Carolina Attorney General concluded that "the provisions of Act [No. 549] are now in effect and it requires that an election be held for the school trustees," that it should be held "[a]s soon as possible" and, finally, regarding the question as to whether the filing period should be re-opened, he concluded that "there is no reason to reopen filing as only the date of the election has changed." Acting upon this legal advice, the Hampton County Election Commission published a Notice of Election setting March 15, 1983, as the date for the election. The five members of each of the two Boards of Trustees were elected on that date. One of the members of the District No. 1 Board of Trustees is black and all five members of the District No. 2 Board of Trustees are black.

ARGUMENT

There is no substantial question presented.

The lower court rejected the appellants' arguments that the implementation of Act No. 549 resulted in at least five violations of Section 5 of the Voting Rights Act by concluding that the allegedly unprecleared changes are either not changes within the meaning of Section 5 or have now been precleared. J.S., App. 11a.

A. Certification of referendum results to South Carolina Code Commissioner.

The appellants' argument concerning the alleged "change" effected by the failure to certify the referendum results to the South Carolina Code Commissioner has apparently been abandoned because they now agree that the certification was in fact made. J.S. 6, n. 2. Accordingly, their argument regarding the lower court's declaration that an allegation of discriminatory intent or effect is necessary to a Section 5 action need not be

reached by the Court because that declaration was made with reference to the certification "change". J.S., App. 8a. These appellees would note, however, that the lower court correctly declared the law in this regard. See, e.g., United States v. Saint Landry Parish School Board, 601 F.2d 859, 865 (5th Cir. 1979); Powell v. Power, 436 F.2d 84, 87 (2nd Cir. 1970); cf., White v. Dougherty County Board of [illegible]ation, 439 U.S. 32, 42 (1978); Georgia v. United States, 411 U.S. 526 at 534 (1973) (§5 changes are those "which have the potential for diluting the value of the Negro vote and are within the definitional terms of §5"); United States v. Georgia, Civil Action No. C76-1531A, slip op. at 7 (N.D. Ga. September 30, 1977), aff'd 436 U.S. 941 (1978).

B. Opening of statutorily prescribed filing period pending preclearance.

The lower court upheld the opening of the statutorily prescribed filing period, August 16-31, 1982, notwithstanding Section 5

preclearance was then pending. It first found that the action was not a "change" but merely a ministerial or administrative decision necessary to accomplish the purpose of Act No. 549. J.S., App. 8a-9a. In this respect, it is similar to running the public notices of the election or printing the ballots, both of which were necessary actions to bring about the change effected by the statute, i.e., elected rather than appointed boards of trustees, but neither of which is itself a change. The preclearance requirement of Section 5 does not apply to every task performed by local officials in order to execute Act No. 549 for, if that were true, the notices could not have been published nor the ballots circulated unless and until precleared.

The statutorily prescribed filing period began before completion of the Attorney General's Section 5 review. The decision to accept filings was an appropriate exercise of administrative discretion aimed at complying

with both the Voting Rights Act and state law. The local officials were attempting to prevent the disruption of Hampton County's educational system and to avoid the expense and confusion of a special election. Inasmuch as Act No. 549 had been submitted to the Attorney General in June, it was not unreasonable to anticipate (and prepare for) its preclearance in time for the November, 1982, general election. Opening the filing period in August as the legislation directed enabled the election to be held in November, 1982, assuming preclearance by then. This good faith attempt to comply with both federal and state law is further evidenced by the fact that, at the same time that filings were allowed for the Boards of Trustees pursuant to Act No. 549, filings were being accepted for the County Board pursuant to Act No. 547. Candidates were permitted to file for either or both offices with the expectation that the matter would be resolved by November and that Hampton County voters would then be able to elect candidates to fill

whichever governing body was the functioning one.

The lower court further found that, even assuming the opening of the August filing period was a Section 5 "change", it was precleared when the Attorney General withdrew his outstanding objection to Act No.549 in late November, 1982. Relying on Berry v. Doles, 438 U.S. 190 (1978), the lower court concluded that the "fact that the eventual preclearance of Act No. 549 followed the filing period for the Trustees' position is not a bar under Section 5." J.S., App. 9a. Act No. 549 has now been precleared by the Attorney General and thus has been found not to have a discriminatory purpose or effect. "[T]he matter [is] at an end." Berry v. Doles, 438 U.S. at 193. Assuming arguendo that the opening of the August filing period before preclearance was technically a violation of Section 5, no Section 5 claim exists now. An injunction against implementation of an unprecleared change is

the only remedy for a violation of Section 5 and that remedy is no longer available because the alleged change has been precleared. The appellants' complaint regarding the local officials' decision to complete the filing period after receipt of the Attorney General's objection on August 26, 1982, is likewise moot because that objection was subsequently withdrawn.

C. Conducting of election in March, 1983, instead of November, 1982, and without re-opening filing period.

The third and fourth allegedly unprecleared changes concern the holding of the election as soon as practicable after preclearance but on a date different from the one prescribed in the statute and without re-opening the filing for candidates. These appellees submit, however, that when the statutorily prescribed date cannot be met because of an outstanding objection from the Attorney General and literal compliance with the statute is thus impossible, the mere

change in the date does not constitute a change which requires Section 5 preclearance. There are legal and practical reasons for this conclusion. First, the Attorney General, who administers the Voting Rights Act and whose interpretation is entitled to great weight [cf., United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978)], manifestly did not consider the statutory date of the first election of the boards of trustees to be a change subject to preclearance because he precleared the statute seventeen days after the statutory date and did not caution, as he has often done, 5/ that any further submission was required. The holding of the initial election for the boards of trustees in March, 1983, rather than during the general election on November 2,1982, due solely to the outstanding Justice Department objection at the time of the general election,

---

5/ See, e.g. United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110, 115 (1978).

merely implemented the statute which had, in the meantime, been precleared. Cf., Berry v. Doles, supra. Factually, it is a de minimis change and legally it is no change. Moreover, the decision to hold the initial election as soon as practicable after preclearance, made, as it was, on the advice of the South Carolina Attorney General, represents a good faith effort to implement a statute whose preclearance reflects that it is more racially equitable and furthers the purpose of the Voting Rights Act to a greater extent than the former appointment process.

Finally, there are practical reasons underlying the decision to elect the boards of trustees as soon as possible without amending the precleared statute. There was the real possibility that an amendment expressly authorizing a later election date would not have been precleared in a timely fashion thereby necessitating another amendment. The amendment process could have gone on indefinitely. Furthermore, the March, 1983,

initial election represents merely a one-time special election held in order to implement the statute and will not recur inasmuch as successive elections will be held on the general election schedule in accordance with the statute.

The failure to re-open filing for candidates for the March, 1983, initial election is not a change at all because the filing had already occurred pursuant to the statute on August 16-31, 1982. Indeed, the re-opening of filing would have constituted a change, arguably requiring preclearance before implementation because no authority existed for a second filing. But the decision not to re-open the filing period conformed with rather than changed the authorized procedure. Furthermore, the appellants' theory for this alleged change is based on the erroneous assumption that a Section 5 change occurred in state law by virtue of the Attorney General's outstanding objection. They contend in effect that the opening of the

filing period in August, 1982, instead of after November 19, 1982, constituted a covered change by reason of the outstanding objection. The outstanding objection, however, was not a change in state law. South Carolina law did not require that a filing period be opened subsequent to the Attorney General's preclearance of Act No. 549. Whether or not that enactment receives Section 5 preclearance is relevant only under federal law; it is not relevant in determining whether a change in state law has occurred because it is not a matter of state law. Therefore, the failure to re-open a filing period after preclearance cannot constitute a change in South Carolina law with respect to voting.

D. Abolishment of the office of Hampton County Superintendent of Education and devolution of his duties on elected boards of trustees.

The final allegedly unprecleared change is the abolishment of the elective office of county superintendent of education and the devolution of his duties on the

elected boards of trustees. This change is precisely one of the changes effected by Act No. 549, [J.S., App. 19a] which has now been precleared in its entirety. The appellants also assert that the local officials have devolved the duties prematurely. J.S. 12. This assertion is vigorously denied by these appellees; moreover, even if it were true, the remedy is an action in state court to enjoin a violation of state law, not a Justice Department review of the unauthorized "change."

The appellants apparently disagree with the Attorney General's preclearance of the provisions of Act No. 549. But they cannot seek judicial review of that official's failure to object even though it "may have been erroneous" because judicial review of the Attorney General's preclearance action is foreclosed. Morris v. Gressette, 432 U.S. 491, 5107, n. 24 (1977). They may now challenge the legislation only in a traditional action questioning its

constitutionality [Allen v. State Board of Elections, 393 U.S. 544, 549-50], an action which is currently pending here. J.S. 6, n.3.

CONCLUSION

These appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and, therefore, respectfully move this Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina.

Respectfully submitted,

SINKLER GIBBS & SIMONS
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

ATTORNEY for Appellees
Hampton County School
District No. 1 and
its Trustees

Bruce E. Davis*
Post Office Box 881
Camden, SC 29020
(803) 432-2880

ATTORNEY for Appellees
Hampton County School
District No. 2 and
its Trustees

*Counsel of Record

CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for these Appellees and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the foregoing Motion to Dismiss or Affirm were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows:

John Roy Harper, II
P. O. Box 843
Columbia, South Carolina 29202

Treva G. Ashworth
P. O. Box 11549
Columbia, South Carolina 29211

Lee S. Bowers
P. O. Box 95
Estill, South Carolina 29918

A. G. Solomons, Jr.
P. O. Box 969
Estill, South Carolina 29918

Bruce E. Davis
P. O. Box 881
Camden, South Carolina 29020

This 18th day of January, 1984.

Karen LeCraft Henderson
KAREN LeCRAFT HENDERSON

Post Office Box 11458
Columbia, S.C. 29211

Office - Supreme Court, U.S.
FILED
JAN 21 1984
ALEXANDER L. STEVAS,
CLERK

(4)

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,
Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH*
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

Attorneys for Appellees Hampton County Election Commission, Its Members, Hampton County Treasurer

*Counsel of Record

BEST AVAILABLE COPY

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,
Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH*
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

Attorneys for Appellees
Hampton County Election
Commission, Its Members,
Hampton County Treasurer

*Counsel of Record

TABLE OF CONTENTS

	PAGE
Jurisdiction.....	1
Statement.....	2
Argument.....	7
Conclusion.....	24

Appendix -

Hearing before the Honorable Charles E. Simons, Jr., Chief District Judge, May 14, 1983.....	1a

TABLE OF AUTHORITIES

Cases:	Page
Berry V. Doles, 438 U.S. 190 (1978)	14, 15
Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982)	19
Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979)	13
Georgia v. United States, 411 U.S. 526 (1973)	12, 18, 19
Heggins v. City of Dallas, Tex., 469 F. Supp. 739 (N.D. Texas (1979)	12, 19
Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981)	11, 19
Moore v. Leflore Cty. Bd. of Election Comm'rs., 351 F. Supp. 848 (N.D. Miss. 1971)	12
United States v. County Comm'n, Hale Cty, Ala., 425 F. Supp. 433 (S.D. 1976)	12
United State v. Sheffield Board of Commissioners, 435 U.S. 110 (1978)	13
Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970)	12

Statutes and Constitutional Provisions:

42 U.S.C. 1973(c)..... 12

Voting Rights Act, §2..... 7

Voting Rights Act, §5..... 7

Act 547, South Carolina Laws (1982).....passim

Act 549, South Carolina Laws (1982).....passim

Rules:

Supreme Court Rule 16(1)(c) and (d)..... 1

U. S. Constitution:

Fourteenth Amendment..... 7

Fifteenth Amendment..... 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1)(c) and (d) of the Supreme Court of the United States, appellees, Hampton County Election Commission and its members, Randolph Murdaugh, III, Richard Sinclair, James Wooten and W. H. Smith, and the Hampton County Treasurer, Wilson P. Tuten, Jr., move the Court to dismiss the appeal herein or, in the alterna-

tive, to affirm the Order of the District Court on the grounds that it is manifest, that the decision below was clearly correct and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

For the purpose of this Motion only, these Appellees assume, without conceding, the Court's jurisdiction herein.

STATEMENT OF CASE

Prior to 1982 Hampton County had an appointed six member County Board of Education. The County was also divided into two school districts which were each governed by a six member Board of Trustees who were appointed by the County Board of Education.

On February 18, 1982, Act 547 was enacted by the South Carolina General Assembly. This Act provided that beginning with the general election in 1982, the Hampton County Board of Education would be composed of six members elected at large. On February 24, 1982, this Act was submitted to the Justice Department for Voting Rights Review and on April 28, 1982 the Justice Department entered no objection to the Act.

Following the enactment of Act 547, but before the Justice Department entered no objection to the Act, the General Assembly enacted a new law regarding the Hampton County education system, Act 549, which, when precleared by the Justice Department, would supersede Act 547. This Act provided for a referendum to be held to decide if the

county wanted to abolish the County Board of Education and the Hampton County Superintendent of Education and have their duties devolve upon the trustees for School District One and Two who would be elected. This Act further reduced the number of Trustees in each district from six to five and required that filing for these offices be held between the dates of August 16-31, 1982. This referendum was held and approved by the electorate. Once all the information for the submission was compiled, the Act was submitted to the Justice Department for preclearance on June 22, 1983.

In order to comply with state law requirements which mandated filing to be held during the period of August 16-31 and federal law requirements that

would prevent a state law from being put into effect if the Justice Department objected to the Act, the Hampton County Election Commission opened filing for officers for either election that might be held; i.e., the election of a County Board of Education pursuant to the provisions of Act 547, or the election of two Trustee Boards pursuant to the provisions of Act 549. The Justice Department did not respond until August 23, 1982, which was in the middle of the mandatory filing period for the offices provided for under the provisions of Act 549. On August 23, 1982, a letter was sent to the South Carolina Attorney General's Office stating that the Justice Department objected to Act 549. This letter was not received by the South Carolina Attorney General's

Office until August 26, 1983. It was then forwarded by mail to the members of the General Assembly who had sponsored the bill. By August 31, 1983, a letter had been sent to the Justice Department formally requesting reconsideration of their objection. On November 19, 1983, the objection was withdrawn. By this time elections required by the only Act then approved by the Justice Department, Act 547, had been required to be held. However, approval of Act 549 voided Act 547 as its provisions were superseded by Act 549.

An election was held on March 15, 1983, for the offices provided for by Act 549. All of the elected members of the District Two Board of Trustees are black. One of the five elected

members of the District One Board of Trustees elected is also black.

On March 11, 1983, this action was brought alleging violations of Section 5 and Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. On March 12, 1983, a Motion for a temporary restraining order was filed by the appellants in this case. This Motion was denied following a March 14, 1983 evidentiary hearing. On September 9, 1983 a three-judge court was convened and dismissed the complaint insofar as it sought to state a claim under Section 5 of the Voting Rights Act.

ARGUMENT

The District Court was manifestly correct in holding that the requirements of Section 5 of the Voting Rights Act

have been met in the instant case in that neither the State nor its political subdivision has sought to enforce a voting change that has not been precleared.

On August 16, 1983 the local officials in the Hampton County had before them an Act that had been precleared by the Justice Department that required a formally appointed County Board of Education to be elected. By the provisions of Act 547 filing for these offices had to be accomplished no later than forty-five days before the November 2 general election. Therefore, sometime in mid-September would be the last day a person could file for this office. On the other hand, there existed another Act, Act 549, which abolished this very Board and required the previously appointed Boards of Trustees to be elec-

ted in a general election. The act further mandated filing for these offices to occur during the designated dates of August 16-31, 1982. This Act had been submitted to the Justice Department in June but no action had at that date been taken on the submission.

In a good faith effort to comply with whatever election would ultimately be held, the Election Commission accepted filings for both offices. By newspaper articles and by communications with each person coming to file for office, they informed persons they should file for both elections because it was not clear which office would be precleared by the Justice Department. (App. 3a-10a). As the court noted in its Order, if filing had not been opened during this time period and

> [i]f Act 549 was precleared, pursuant to State law, it would supersede Act No. 547. But if preclearance came after August 31, Trustee elections could not be held as scheduled, because no candidate would have qualified by filing during the specified statutory filing period. (J.S. 4a-5a)

There is no question but that Act 549 contemplated the elections for the Boards of Trustees to be held in the November general election. If on August 23 the Justice Department had precleared Act 549, rather than initially objecting to the Act, the local officials would have been derelict in their duty if they had not been preceding with the preliminary filing procedures which would have allowed this election to proceed.

Allowing filing for an office does not constitute the enforcement of a change without preclearance. It is simply a preliminary step to an election

that was subsequently approved. If the Act had been disapproved, the filing would have been null and void. However, the Act was approved and, therefore, the filing was properly opened during the dates specified by the Act and those dates only.

The Justice Department has even taken the position in Court that merely preliminary steps to an election should be continued pending preclearance of a submitted change. In Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981) at footnote 11 the court notes that the United States Attorney General as amicus curiae had "...urged that... [the court] deny an injunction against the holding of the primary election on September 10, in hopes that pre-

clearance by the Attorney General will be forthcoming prior to the general election of November 3." 1/

The Justice Department has also been on record as retroactively approv-

---

1/ In the instant case the Appellants are alleging that the Appellees improperly allowed preliminary filing procedures before preclearance and that this should be found to violate 42 U.S.C. 1973(c). However, there have been many cases in which the courts have found that a questioned change was one that should have been precleared and yet even in the face of this finding authorized an election to proceed. United States v. County Comm'n, Hale Cty, Ala, 425 F. Supp. 433 (S.D. Ala. 1976), judg't aff'd, 430 U.S. 924 (1977); Moore v. Leflore Cty. Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971); Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970). See also Georgia v. United States, 411 U.S. 526 (1973). As stated in the dissent of Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 745-746 (N.D. Texas 1979):

> [a] reading of the cases reveals that enjoining an election for an indefinite time until preclearance is obtained is the exceptional remedy rather than the normal one. [cites omitted.]

ing changes that have already been implemented. In Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979), a suit was brought contesting the validity of registration of voters because the registration was conducted pursuant to laws that were implemented eight months before they were submitted to the United States Department of Justice for preclearance. The Court held that since the Justice Department had subsequently approved the changes and was aware of the fact registration had already occurred under the new laws, the city had satisfied the preclearance requirements of Section 5. Additionally, in United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978), the Town of Sheffield wrote the Justice Department that they wanted to hold a refer-

endum on whether or not the form of government should be changed. The referendum was held before the Justice Department responded. The Attorney General stated in his subsequent letter that he did not object to the referendum, that he was aware the referendum had been held and that since the voters had approved the change, the implementation of that change would also have to be submitted for preclearance.

In the case of Berry v. Doles, 438 U.S. 190 (1978), this Court recognized this principle when the Court upheld a three-judge Court that had allowed an election to stand even though the change had not received preclearance. The Court found that the change should, however be submitted and "[i]f approval is obtained, the matter will be at an end."

Berry, supra at 193.

The Appellees would submit that this same principle of retroactive approval is applicable in the instant case and should be applied to the Appellants' allegations regarding filing while the Act was being considered twice by the Justice Department; and, therefore, the issue is moot. 2/

2/ The appellants further argue that filing was ineffective from August 23, 1982, when the Justice Department entered their original objection to Act 549. Appellees would assert that the letter of objection was not received by the South Carolina Attorney General's Office until August 26, 1982 and was then forwarded by mail to the Representative who introduced the bill. On August 31, the last day of the filing period, a letter was sent officially requesting reconsideration of the objection. The request for reconsideration kept open the possibility that Act 549 might eventually be approved thereby necessitating the continuation of filing. Additionally, the Chairman of the Hampton County Election Commission has testified that he never received official notification that Act 549 had been objected to. (App. 9a-10a).

Likewise, there was no procedure or reason to re-open filing following preclearance from the Justice Department of the Act. The preliminary requirements of the Act to have filing from August 16-31, had been met and only the election date had been postponed while awaiting preclearance from the Justice Department.

Potential candidates had been repeatedly advised in newspaper articles and when coming in to file, to file for both races; i.e. the election that would be held under the provisions of either Act 547 or Act 549. (App. 4a-5a, 7a-9a). There was, of course, also the option of a write-in candidacy for anyone who failed to file during the statutory time period.

When the Justice Department precleared Act 549, they also precleared

the provision in the Act that required filing to be held August 16-31, 1982. If the local officials had suddenly, without authority, re-opened filing that would have been a change requiring pre-clearance. To have reopened filing would not only have been beyond the powers of the local officials, it would have affected the rights of those candidates who had filed during the statutory time limits established by the precleared Act.

Appellees further allege that pre-clearance should have been obtained prior to the change of the date of the elections provided for in Act 549 from November, 1982 to a subsequent time. 3/

3/ The effect of preclearing Act 549 was to moot the provisions of Act 547. These two Acts provided for two completed alternative forms of a governing body for the Hampton County School District. Once Act 547 was superseded by Act 549, its provision establishing a

In Georgia v. United States, 93 S.Ct. 1702 (1973), the Supreme Court stated that:

> ...it is important to focus on the entire scheme of §5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General 'merely gives the governed State a rapid method of rendering a new State election law enforceable.' [Cite omitted.] (Emphasis added.) Georgia, supra, 411 U.S. at 538.

The general language in Voting Rights Act cases is to the effect that

---

county board of education was null and void. There was no valid governing body for the school district because Act 549 abolished this board and required the trustees to be elected. This election by statute was to have taken place November, 1982. Therefore, the county was without a valid governing body for the school district and an election had to be held as soon as possible.

any future elections are enjoined unless and until the State receives Section 5 preclearance. Georgia, supra, 411 U.S. at 541; Herron, supra, at 176, Heggins v. City of Dallas, Tex., supra, at 743. In Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982) the Court stated that until preclearance was received on a congressional redistricting plan the election would be postponed "... until the earliest practicable date."

As stated in Georgia, supra, the purpose of providing an alternative procedure of submitting a change to the Justice Department was to provide for a rapid way of making a law enforceable. As many changes submitted for preclearance involve election dates, it would seem inconceivable that the Act envi-

sioned that every submission "freezing" an election date until approval by the Justice Department and which was not precleared until after the election date established by the Act, would require the General Assembly of the State to enact a new law establishing a new election date and submit it all over again for approval. This procedure could continue on ad infinitum if each approval would come after the date established by the law for the election. This procedure in itself would be a way of circumventing the Voting Rights Act and avoiding perhaps unpopular elections. In this case, the Justice Department did not remove their objection until November 19, 1982. Under Plaintiffs' rationale an election could not be held until the General

Assembly reconvened in January, enacted new legislation establishing a new election date for Hampton County, ratified the Act, and submitted it to the Justice Department for approval. If this was done for every Act that established election dates, the elections would be held years out of time with the present office holders holding over years past their term of office.

> As the District Court held:
> [i]t is not questioned that Act No. 549 constituted a Section 5 'change' that required preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not 'changes' contemplated by Section 5, and thus did not require preclearance.
> (J.S. 9a)

Appellants raise the argument of whether or not the district court correctly found that a racially discriminatory purpose or effect was a requirement of a Section 5 case. (J.S. 15). The Court discussed this only in passing and in connection with whether or not an alleged failure of the election commissioner to certify the results of the referendum was a change that should have been precleared. (J.S. 8a). The Appellants have conceded now in their brief, that the results were certified to the Code Commissioner. (J.S. 6, n2). Therefore, having abandoned this part of their appeal, we would submit that Appellants lack standing to now brief the question of whether or not the District Court was correct in its reasoning of this aspect of the case.

As to Appellants' argument regarding the office of Superintendent of Education and their allegation that the Superintendent's Office has been abolished without preclearance, the abolition of this office was a part of Act 549 and was approved when Act 549 was approved. This finding was the extent of the District Court's determination as to this allegation. (J.S. 10a-11a).

CONCLUSION

Wherefore, these Appellees respectfully submit that the decision below was clearly correct and that the questions upon which the cause depend are so unsubstantial as not to need further argument, and these Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment below without a hearing.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR HAMPTON COUNTY ELECTION COMMISSION
Murdaugh, Sinclair, Wooten, Smith; Hampton County Treasurer, Wilson P. Tuten, Jr.

APPENDIX

These portions of the Transcript of Record of the Hearing before the Honorable Charles E. Simons, Jr. are excerpted from the following pages of that Transcript: pp. 23-24; 26-28; 31-32; 37.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION Civil Action No. 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ETC., ET AL.,

Plaintiffs,

vs.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Defendants.

H E A R I N G

BEFORE: The Honorable Charles E. Simons, Jr., Chief District Judge

May 14, 1983
Aiken, South Carolina

Appearances:

John R. Harper, II, Esq.
For the Plaintiffs

Charles H. Gibbs, Esq. and
Marvin Infinger, Esq.
For the defendant School Districts

A. G. Solomons, Jr., Esq.
For the defendant Hampton County Council

R A N D O L P H M U R D A U G H, I I I, called as a witness, and having been duly sworn by the Clerk, in answer to questions propounded, testified as follows,

to wit:

DIRECT EXAMINATION

BY MR. INFINGER:

Q. Mr. Murdaugh, state your name please?

A. Randolph Murdaugh, III.

Q. Are you a member of the Hampton County Election Commission?

A. I am.

Q. In what capacity?

A. I am the chairman of it.

Q. All right, sir. For how long have you been the chairman?

A. I've been the chairman probably for ten years. I've been on the

election commission probably for four-
teen. That's guesstimate.

* *

Thereafter, subsequent to the passage of the referendum, and prior to the November election, we began getting word that the Justice Department had interposed an objection to the referendum. And as the election got closer and closer, we got to the point to where we did not know what was happening. The -- I think, I might be wrong about this -- I think that the first word that I got was -- from it was from Mr. Kesler. He told me he had been informed of it. The -- I tried to find out something about it and couldn't. I finally called John Dodge our superintendent of education and he gave me a copy. My recollection is

that he gave me a copy of the first actual notice that I had that the objection had been interposed.

At the same time, they were trying to get Justice to reconsider their objection to it. The election commission was in a quandry as to what election to hold. So we thought that the best thing that we could do would be to have filing for the county -- the newly proposed elected county school board and to accept filing for the two individual district boards in accordance with the referendum. Then we would wait until the election got here and find out which election we could hold. And we did that.

There were at least two articles in the newspaper in which I gave an interview stating that. Everybody

that came into my office to file either under the limited filing of the referendum or under the general filing for the county board, I told them that we did not know which election we would hold, that if Justice kept its objection in, we would elect a county school board, if Justice withdrew their objection, we would elect the various -- the individual district boards.

The Justice did not withdraw their objection. We held a county school board election, certified the results of that. After the election of November the 2nd, I think it was, I'm not sure of the date, we learned again that Justice perhaps had withdrawn their objection. The first notice I got from that, I don't remember where it came

from, I finally got Johnny Linton, who represents one of the school boards to give me a copy of that letter. The election commission, there are five of us on the commission, and I talked with the commissioners, and as to what we should now do. We had a referendum that was not contrary, but limiting insofar as filing is concerned with the general law filing, that being that you had to file between the 16th and 31st of August, for the election.

* *

Q. All right, sir. Mr. Murdaugh, I want to ask you one more question. You had some earlier testimony about filing for both?

A. Yes, sir.

Q. Would you explain that again?

A. Yes sir. As I said, we had no

idea what election, and when I say we, I'm talking about the election commission, we had no idea what election we were going to hold. There was the bill, I think from January of that year, or some other time, the preceding bill enacting a county school board to be elected. We had the referendum that had passed in which Justice -- we had been informed, never been notified but had been informed that Justice was going to object to or had objected to.

So we --

THE COURT: That bill was approved on February 18th, '82.

THE WITNESS: That's the school board.

THE COURT: And this 398 was approved April the 9th, '82.

A. Yes sir. So what we figured

that the best thing we could do is let anybody file for any office that they wanted to of those three. In other words, if a man came in and wanted to file for north district number one, district board, we would tell him, we don't know what election is going to be held, we don't know whether we're going to elect district boards or whether we're going to elect a county board. You have a right to file for both of them. A number of people, in fact, that's most of the people, and I'm saying this without -- without looking it up factually, but I would say that the majority, I will put it that way, of the candidates that ran for county school board, did also file for one of the two district boards, depending on which geographical location they

lived in.

We told them that once we got to the point that we knew what was going to happen, that we would then tell them which office they were running for. And we did that.

* *

A. Let me tell you this way, sir, I knew that I wasn't going to hold, if what you are asking me, I knew I wasn't going to hold district elections unless Justice told me it was all right to do it. And I didn't hold it.

Q. But yet you continued to accept filings?

A. Yes sir, because you have got to bear in mind my testimony, I have never been officially notified of the Justice's objection. There was street talk going around Hampton. I finally

got a copy of the letter that Justice sent out from John Dodge when I called him up and asked him to tell me about it, sir. I have to this day, never been officially notified of it. I got a letter, and that's sufficient. I mean, I got enough sense to understand that if I held an election after reading that letter, that I would be doing something wrong.

(5)

Office - Supreme Court, U.S.
FILED
FEB 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

APPELLANTS' REPLY BRIEF

JOHN R. HARPER II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

JACK GREENBERG
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants
* Counsel of Record

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

==========

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., et. al.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., et. al.,

Appellees.

==========

On Appeal From the United States District Court for the District of South Carolina

==========

APPELLANTS' REPLY BRIEF

==========

Appellants submit this Reply Brief in response to the motions to dismiss or affirm filed on behalf of the Hampton County Election Commission and the Hampton County School Districts Nos. 1 and 2 and

the members thereof. Since the decision below, and the arguments of appellees, turn a substantial degree on the legal significance of a decision by the Attorney General to preclear a statute under section 5 of the Voting Rights Act, we suggest that it might be appropriate for the Court to request the views of the United States regarding this appeal.

In our Jurisdictional Statement we urged that the decision of the district court would radically alter the scope and effectiveness of section 5 of the Voting Rights Act. Neither of the appellees disagree with our reading of the decision below. Rather, the appellees expressly and enthusiastically endorse the new exceptions to section 5 established by the district court and urge their approval by this Court.

The Election Commission asserts that

the decision below adopts a "principle of retroactive approval"[1/], pursuant to which approval of a change in election law under section 5 automatically approves nunc pro tunc all violations of the Voting Rights Act occasioned by the illegal implementation of that new state law. The Commission urges, in addition, that the Attorney General of the United States has expressly endorsed this principle, and that in approving a change in election law under section 5 it is in fact the intent of the Attorney General to approve all related violations of federal law, regardless of whether he may not know that those violations occurred.[2/]

Six years ago Justice Brennan warned that, if section 5 approval automatically

---

1/ Election Commission, Motion , p. 17.

2/ Id. pp. 11-16.

carried with it retroactive approval of past violations, there would be little reason to obey section 5 at all. Berry v. Doles, 438 U.S. 190, 194 (1978). The Commission agrees. It urges that, so long as Act 547 had not yet been rejected by the Attorney General under section 5, local officials would have been "derelict in their duty"[3/] if they had failed to enforce that change in election law. Even after the Attorney General disapproved Act 547, further implementation, the Commission asserts, was "necessitat[ed]" by the fact that a request for reconsideration was pending.[4/] In the Commission's view the decision below not merely permits but requires local authorities to implement an unapproved change in election law in

---

3/ Election Commission Motion, p. 10.

4/ Id. 17. n.2.

violation of the Voting Rights Act so long as there is any hope that that violation will later be forgiven under the "principle of retroactive approval." Because of this principle, the Commission asserts, the issuance of an injunction against the holding of an election which lacks section 5 preclearance should be "the exceptional remedy rather than the normal one."[5/]

In making this argument, the Commission ignores now, as it has ignored throughout this case, the express language of section 5. The statute says that a covered voting change may not be enforced "unless and until" it is precleared. As shown by the Senate and House Committee Reports accompanying the 1982 extension of the Act, cited at pp. 14-15 of our Juris-

---

5/ Id. 12 n.1.

dictional Statement, Congress has made plain the importance it attaches to those words.

The School Districts read the decision below as holding that section 5 preclearance entails, not only the granting of a blanket pardon of all past violations of federal law,[6/] but also the issuance of a prospective indulgence forgiving in advance changes in election laws which may later be made in connection with the implementation of an approved statute. How a new statute is to be implemented, even where that decision involves such important questions as candidate qualifications, is said to be a matter of "administrative discretion"[7/] apparently outside the scope of section 5. Even though the County Election Commission

---

6/ School Board Motion, pp. 16-17.

7/ Id. p. 14.

itself did not know whether to hold an off-year election under state law, and had to seek legal advice from state officials, the School Districts insist that the Attorney General somehow foresaw what that advice would be, and by his letter of November 19 1982, implicitly approved in advance the decision of January, 1983 to hold such a special election.[8/] We agree with the School Districts that the decision below appears to give to a preclearance decision the effect of approving all changes in election law that may later be made in the implementation of that law, regardless of whether the Attorney General knew or could have known that such changes would occur. Nothing in the Voting Rights Act or applicable regulations, however, suggests that the Attorney General intends to "approve" changes which were never submit-

---

8/ Id. at 18.

ted for preclearance or about which he had no knowledge.

CONCLUSION

This Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN R. HARPER, II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

JACK GREENBERG
LANI GUINIER
ERIC SCHNAPPER
16TH Floor
99 Hudson Street
16th Floor
New York, N.Y. 10013

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

* Counsel of Record

Office - Supreme Court, U.S
FILED
MAY 24 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1015

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL., APPELLANTS

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

20 pp

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the scheduling of a qualifying period for candidates and the setting of a date for an election are "changes" subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the Attorney General precleared either the August 1982 qualifying period for candidates for the March 15, 1983 election or the March 15, 1983 election date itself when he withdrew his objection to Act No. 549.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544 ..... 7, 8, 9, 10, 12
Berry v. *Doles*, 438 U.S. 190 ..... 6, 11, 16
Blanding v. *DuBose*, 454 U.S. 393 8
Dougherty County Board of Education v. *White*, 439 U.S. 32 ..... 8, 10, 14
Georgia v. *United States*, 411 U.S. 526 (1973) 14
Hadnott v. *Amos*, 394 U.S. 358 9
Local 3489, United Steelworkers v. *Usery*, 429 U.S. 305 15
McCain v. *Lybrand*, No. 82-282 (Feb. 21, 1984) 12
Perkins v. *Matthews*, 400 U.S. 379 ..... 9, 10, 11, 16
United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 ..... 7, 8, 10, 12

Constitution, statutes and regulations:

U.S. Const.:
Amend. XIV 2
Amend. XV 2

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 2
§ 5, 42 U.S.C. 1973c ..... *passim*

Act of Feb. 18, 1982, Act No. 547, 1982 S.C. Acts 3495 ..... 3, 5
Act of Apr. 9, 1982, Act No. 549, 1982 S.C. Acts 3497 ..... *passim*

Constitution, statutes and regulations—Continued:	Page
28 C.F.R. Pt. 51:	
Section 51.8	13
Section 51.11	9
Section 51.12(g)	10
Section 51.12(i)	11
Section 51.20	4
Section 51.27	14
Section 51.35	13
Section 51.37	13

Miscellaneous:	Page
H.R. Rep. 94-196, 94th Cong., 1st Sess. (1975)	10
H.R. Rep. 97-227, 97th Cong., 1st Sess. (1981)	10
S. Rep. 94-295, 94th Cong., 1st Sess. (1975)	10
S. Rep. 97-417, 97th Cong., 2d Sess. (1982)	10
Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965)	9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1015

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL., APPELLANTS

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINION BELOW

The order of the three-judge district court (J.S. App. 1a-11a) is not reported.

JURISDICTION

The order of the three-judge district court was entered on September 9, 1983 (J.S. App. 1a). A notice of appeal was filed on Monday, October 10, 1983 (J.S. App. 12a-13a). By order of December 7, 1983, the Chief Justice extended the time in which to

docket the appeal to December 16, 1983, and the appeal was docketed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

Appellants, two civil rights organizations and several residents of Hampton County, South Carolina, filed this action in the United States District Court for the District of South Carolina on March 11, 1983, to enjoin the holding of elections for two boards of trustees of the Hampton County public schools. Appellants alleged that the County had not received preclearance from the Attorney General under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to conduct the elections. A three-judge court declined to enjoin the scheduled March 15, 1983 election and, on September 9, 1983, issued an order denying appellants' request for further injunctive relief and dismissing their complaint insofar as it sought relief under Section 5. J.S. App. 1a-11a.[1]

1. Prior to 1964, the Hampton County public schools were governed by a six-member County Board of Education (the County Board). The members of the County Board were appointed by the Hampton County delegation to the South Carolina legislature. The County Board, in turn, appointed two six-member boards of trustees, each of which administered one of the County's two separate school districts. The County's voters elected at-large a County Superintendent to serve as an advisor to the teachers and the trustees of the two school districts. J.S. App. 2a.

---

[1] Appellants also alleged violations of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Those claims are still pending in the district court. J.S. 6 n.3.

On February 18, 1982, the South Carolina General Assembly passed Act No. 547, 1982 S.C. Acts 3495 (J.S. App. 17a-18a), which restructured the mode of governance of the Hampton County school system. Specifically, Act No. 547 provided that beginning January 1, 1983, the County Board was to be composed of six members who were to be elected at-large, rather than appointed. The Superintendent, who would continue to be elected at-large, was to serve as an ex officio member of the Board, with all of the rights and privileges of the other members, including the right to vote. J.S. App. 2a-3a. The first elections for the newly constituted Board were to be held in November 1982. As the three-judge court found (*ibid.*), the purpose of electing, rather than appointing, the County Board members was to create a Board that would be responsive to the consolidation of the County's two separate school districts. Act No. 547 was submitted for preclearance by the Attorney General pursuant to Section 5, and the Act was precleared on April 28, 1982 (J.S. App. 3a).

On April 9, 1982, however, legislation was enacted to overturn Act No. 547. Act No. 549, 1982 S.C. 3497 (J.S. App. 19a-21a), abolished the County Board and the office of Superintendent and turned governance of the Hampton County public schools over to the two boards of trustees. Act No. 549 further provided that, beginning with the November 1982 general election, the trustees of each of the two school districts were to be elected at-large by a plurality of the voters in each respective district. Act No. 549 also reduced the number of trustees serving on each board from six to five and required every candidate for election in November 1982 to file with the Hampton County Election Commission during the period August 16-31,

1982. Implementation of Act No. 549 required approval by a majority of the qualified voters of Hampton County in a referendum to be held in May 1982. On May 25, 1982, the Hampton County Election Commission conducted the required referendum and a majority of the voters approved Act No. 549. J.S. App. 3a-4a.

The County submitted Act No. 549 for Section 5 preclearance by the Attorney General on June 16, 1982.[2] On August 16, 1982, while the request for preclearance was pending, the County began accepting filings under Act No. 549 for the position of trustee. On August 23, the Attorney General interposed an objection to Act No. 549, stating that he was unable to conclude that abolition of the County Board did not discriminate against black residents of Hampton County. The Election Commission nevertheless continued to accept filings for the election of trustees under Act No. 549, as well as filings for the election of County Board members under Act No. 547. On September 1, 1982, the County requested the Attorney General to reconsider his objection to Act No. 549. J.S. App. 4a-5a.

As of November 2, 1982, the Attorney General had not responded to the County's request for reconsideration of his objection to Act No. 549. Accordingly, the

[2] Although Department of Justice regulations expressly authorize submission and preclearance of "a change for which approval by referendum * * * is required * * * if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken" (28 C.F.R. 51.20), the County waited until approximately three weeks after the referendum to submit Act No. 549 for preclearance by the Attorney General. The Attorney General received the submission on June 24, 1982 (J.S. 4).

County proceeded on that date, pursuant to Act No. 547, to hold elections for the offices of County Board members and Superintendent of Education. On November 19, 1982, the Attorney General withdrew his objection to Act No. 549. Thereafter, on the advice of the South Carolina Attorney General, the Election Commission scheduled a special election for March 15, 1983, to select the trustees of the boards of the two school districts. Only those candidates who had filed for these positions during the August 1982 qualifying period were permitted to stand for election. One black and four white trustees were elected to the District One Board; all five trustees elected to the District Two Board are black. J.S. App. 5a-7a & n.2.

2. Appellants sought to enjoin the holding of the scheduled March 15, 1983 election on the ground, inter alia, that the County had violated or would violate Section 5 by:

(1) Continuing to accept filings for the trustee positions after the Attorney General had objected to Act No. 549;

(2) conducting an election for trustees without first seeking authority for a filing period;

(3) conducting an election for trustees without holding a filing period subsequent to the Attorney General's withdrawal of his objection to Act No. 549;

(4) conducting an election for trustees on a date other than that specified in Act No. 549; and

(5) abolishing the office of Superintendent of Education and transferring his duties to the two boards of trustees.[3]

[3] Appellants have abandoned their further contention that the County violated Section 5 by holding the election for trustees without first certifying the results of the May 1982

Concluding that the County had complied with its obligations under Section 5, the three-judge court refused to enjoin the scheduled election and, by order dated September 9, 1983, denied any further injunctive relief (J.S. App. 8a-11a). The court held (*id.* at 9a) that the first four actions challenged by appellants were not changes within the meaning of Section 5, but merely "the ministerial acts necessary to accomplish [Act No. 549's] purpose." Even assuming these actions were Section 5 changes, the court concluded (J.S. App. 9a-10a) that the Attorney General had precleared them when he withdrew his objection to Act No. 549. Relying on this Court's decision in *Berry* v. *Doles*, 438 U.S. 190 (1978), for the proposition that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval" (J.S. App. 10a), the court held (*ibid.*) that "the eventual preclearance of Act No. 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished."

Finally, the court held (J.S. App. 10a-11a) that the abolition of the office of Superintendent of Education and the devolution of his duties upon the boards of trustees of the two school districts had been provided for by Act No. 549 and therefore were precleared by the Attorney General when he withdrew his objection to the Act.

DISCUSSION

The United States urges summary reversal of this case because, although the district court erred, the case does not involve novel or complex questions

---

referendum to the South Carolina Code Commissioner, as required by Act No. 549. J.S. 6 n.2.

of law requiring plenary consideration by this Court. Rather, the district court simply failed to follow this Court's consistent admonition that all changes in voting practices or procedures must be unambiguously submitted and precleared before they can be implemented by jurisdictions covered by Section 5 of the Voting Rights Act. See, *e.g.*, *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). Specifically, the district court erred in two respects. First, its holding that the scheduling of a qualifying period for candidates and the setting of a date for an election are not changes subject to Section 5 preclearance is contrary to precedent and to the intent of Congress. Second, the court erred in concluding that even if the scheduling of the qualifying period and the setting of the election date involved here were changes within the meaning of Section 5, the Attorney General precleared them when he withdrew his objection to Act No. 549.

1. The district court held that the County's scheduling of a filing period for candidates and setting of a date for the election itself are not changes subject to Section 5 preclearance because they were simply "ministerial acts" necessary to implement a new law. But neither the language of Section 5 nor this Court's broad construction of it leaves room for any exception from the preclearance requirement for such "ministerial" acts.

Recognizing the discriminatory potential inherent in changes in voting practices and procedures, Congress determined that before certain jurisdictions would be permitted to put any such changes into effect the changes would have to be approved either by the United States District Court for the District of Columbia or the Attorney General. Section 5 of

the Voting Rights Act of 1965 thus requires Hampton County, as a covered jurisdiction, to obtain a declaratory judgment from the United States District Court for the District of Columbia or preclearance from the Attorney General whenever it

> enact[s] or seek[s] to administer *any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 • • •.

42 U.S.C. 1973c (emphasis added).

In order to achieve the prophylactic purpose of Section 5, this Court has consistently construed the statutory language to reach "*any* state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. at 566 (emphasis added). In so doing, the Court acknowledged (*id.* at 568) Congress's "intention that all changes, no matter how small, be subjected to § 5 scrutiny."

This broad interpretation of Section 5 is buttressed by regulations pursuant to which the Attorney General enforces Section 5.[4] They too emphasize that

> [a]*ny* change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused

[4] Recognizing "the central role of the Attorney General in formulating and implementing § 5," the Court has accorded "particular deference" to his interpretation of the scope of the provision, as codified in the regulations. *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 39 (1978). See also *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 138.

> objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

28 C.F.R. 51.11 (emphasis added).

Applying this construction of the statute, this Court has required Section 5 preclearance of such changes as the relocation of polling places, on the ground that (*Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971)): "The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise." For the same reasons that a change in the location at which an election is held is a change within the meaning of Section 5, a change in the timing of an election also is subject to the preclearance requirement.

In addition, in holding that the relocation of polling places is a change covered by Section 5, the Court in *Perkins* relied (400 U.S. at 387-388) on legislative history that makes clear that Section 5 also was intended to cover a change from voting by ballot to voting by machine. *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 61-62, 95 (1965). See also *Allen* v. *State Board of Elections*, 393 U.S. at 568. Surely the setting of dates for candidate qualification and the scheduling of the election itself are no more "ministerial" than is a change from paper ballots to voting machines.

Moreover, the Court has expressly held that the preclearance requirement of Section 5 applies to changes in the requirements for candidate qualifications. In both *Hadnott* v. *Amos*, 394 U.S. 358, 365-366 (1969), and *Allen* v. *State Board of Elections*,

393 U.S. at 551, 570 (*Whitley* v. *Williams*), the Court required preclearance of a change in the date by which an independent candidate was required to file a declaration of his candidacy. See also 28 C.F.R. 51.12(g) (describing as a change subject to preclearance "[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices"). These authorities make clear that the County's scheduling of the filing period for candidates for the office of trustee for August 16-31, 1982, was a change subject to the preclearance requirement of Section 5.[5]

The danger inherent in recognizing an exception to Section 5 coverage for "ministerial" acts is evident. Potential for discrimination exists not only in the practices and procedures surrounding the actual casting of ballots, but equally in the more mundane steps preliminary to the election itself. Under the interpretation of the Act adopted by the district court a covered jurisdiction could obtain preclearance of a general statute without specifying the steps necessary for its implementation. Thereafter it would be free to implement the statute through steps that had the purpose or effect of discriminating against mi-

[5] In committee reports accompanying its enactment of extensions of the expiration date of the Voting Rights Act, Congress has repeatedly cited with approval the broad interpretation of the Act's coverage contained in *Allen* v. *State Board of Elections* and *Perkins* v. *Matthews*. See H.R. Rep. 94-196, 94th Cong., 1st Sess. 9 (1975); S. Rep. 94-295, 94th Cong., 1st Sess. 16 (1975). Accordingly, this Court has reaffirmed these prior holdings in *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 122-123 (1978), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 37-40 (1978). See also S. Rep. 97-417, 97th Cong., 2d Sess. 8 (1982); H.R. Rep. 97-227, 97th Cong., 1st Sess. 6 (1981).

nority voters. Such a result clearly is contrary to the very purpose of Section 5.

2. A distinct question is whether the changes at issue were precleared when the Attorney General withdrew his objection to Act No. 549.[6] For the reasons discussed below, we agree with appellants that they were not.[7]

[6] The authority for such retroactive approval arises from this Court's decisions in *Perkins* v. *Matthews*, 400 U.S. at 396-397, and *Berry* v. *Doles*, 438 U.S. 190, 192-193 (1978). In those cases, the Court held that, in certain circumstances, the appropriate remedy for failure to preclear an election change was not to invalidate the election automatically, but rather to afford the offending jurisdiction a reasonable time within which to seek preclearance. Likewise, where the circumstances warrant, the Attorney General is entitled to extend retroactive approval to a change that has already been put into effect.

[7] We agree with the district court (J.S. App. 10a-11a) that the abolition of the office of Hampton County Superintendent of Education and the devolution of his duties on the boards of trustees were specifically provided for by Act No. 549 and therefore were precleared when the Attorney General withdrew his objection to that Act. Appellants alleged in the district court, however, that the Superintendent was prematurely stripped of his duties and authority (J.S. 12). We lack sufficient knowledge to determine whether this action requires further Section 5 clearance. To the extent that the Superintendent's loss of responsibility is an inevitable and foreseeable consequence of the abolition of the County Board, which he served, the change has been precleared. If, however, the County has abolished the office of Superintendent prior to January 1, 1985, contrary to Act No. 549, it has shortened the term of an elected official and must seek clearance of the change under Section 5. See 28 C.F.R. 51.12(i) (defining as a change subject to preclearance "[a]ny change in the term of an elective office or an elected official or in the offices that are elective").

a. In our view, the district court erred as a matter of both fact and law in holding that the Attorney General's withdrawal of his objection to Act No. 549 precleared the setting of the March 1983 election date. As a matter of fact, the district court clearly erred in viewing the setting of the March 1983 election date as an "act[] of implementation [of Act No. 549] which had already been accomplished" (J.S. App. 10a) at the time of the November 19, 1982 withdrawal of objection. To the contrary, as the district court itself elsewhere found (*id.* at 7a-8a), the March 15, 1983 election date was not set until January 1983, two months *after* the Attorney General withdrew his objection.

Moreover, the consistent decisions of this Court preclude the conclusion that the withdrawal by the Attorney General of his objection constituted an implicit preclearance of an election date to be set sometime in the future. The Court has frequently emphasized (*United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 136) that

> the purposes of the [Voting Rights] Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.

Accord, *McCain* v. *Lybrand*, No. 82-282 (Feb. 21, 1984), slip op. 12; *Allen* v. *State Board of Elections*, 393 U.S. at 571 ("[a] fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act"). In this case, when the Attorney General withdrew his objection to Act No. 549 on November 19, 1982, he

was aware, *at most*, that the submitted election date had passed and that a new date would have to be set. Under the foregoing authorities, such knowledge decidedly does not constitute preclearance of an election date that was never submitted and, indeed, was yet to be set at the time of the alleged approval.[8]

Advance preclearance of future, unspecified changes thus is contrary to the basic concept of Section 5. It is also inconsistent with the practicalities of ad-

---

[8] The same authorities undermine appellees' reliance (Mot. to Dismiss or Affirm of Hampton County School Districts 18) on the fact that the Attorney General did not note in his letter withdrawing his objection to Act No. 549 that the setting of a new election date would be subject to further submission. Section 5 clearly places the burden of submitting a voting change on the covered jurisdiction, regardless of whether the Attorney General has made a specific request for a submission.

Appellees have never claimed that they submitted the March 15, 1983 election date for preclearance. Rather, in addition to the spurious "implicit preclearance" argument answered in the text above, they argue that the establishment of a new date for the election was not a change and that, as a pratical matter, submission of election dates for preclearance would be impossible, since the Attorney General might not respond before the scheduled date (Mot. to Dismiss or Affirm of Hampton County Election Commission and Treasurer 17-21; Mot. to Dismiss or Affirm of Hampton County School Districts 17-20). Because the Attorney General must respond to any submission within 60 days after he receives all of the necessary information (28 C.F.R. 51.8, 51.35, 51.37), however, a covered jurisdiction need only select an election date sufficiently far in the future to allow preclearance. Even here, if appellees had made a complete submission of the date change in question at the time that change was made—January 1983—there is no reason to believe that the Attorney General's decision could not have been made prior to the scheduled March 15 election date.

ministering the statute. In the small percentage of cases in which an objection is interposed, the objection is based not on abstract surmise, but rather on the practical realities of the specific changes proposed, which often are brought to the Attorney General's attention by members of the communities that will be affected by the change. Indeed, the Attorney General's regulations (28 C.F.R. 51.27) expressly provide for the submission of comments by interested individuals and groups. Such comments obviously are most usefully addressed to specific changes that are proposed in the jurisdiction's submission. Hence, the entire administration of the Act would be undermined if as yet unspecified future changes were held precleared by implication at the time of preclearance of related legislation. As this Court has reiterated, Section 5 is concerned " 'with the reality of changed practices as they affect Negro voters.' " *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 41 (1978) (quoting *Georgia* v. *United States*, 411 U.S. 526, 531 (1973)).

b. For the same reasons, the withdrawal by the Attorney General of his objection to Act No. 549 also did not preclear the setting of the August 16-31, 1982 filing period for candidates for the rescheduled March 15, 1983 election. To be sure, Act No. 549, as submitted to the Attorney General and as approved by him when he withdrew his objection on November 19, 1982, provided for an August 16-31, 1982 filing period.[9] That filing period, however, was for "candi-

[9] Act No. 549 provides in pertinent part (J.S. App. 19a-20a):

> Beginning with the general election in November, 1982, trustees for Hampton County School Districts Nos. 1 and 2 shall be elected by a plurality vote of the electors within their respective district qualified and voting at the general election for representatives. The number of trustees shall be five for each school district and their terms of office shall begin January 1, 1983.
>
> * * * * *
>
> A candidate for membership on a school board must reside in the school district he seeks to represent and all candidates offering for election in November, 1982, must file during the period August 16-31, 1982.

dates offering for election in November, 1982" (note 9, *supra*). As discussed above (pages 4-5, *supra*), because of the Attorney General's initial objection to Act No. 549, no election for trustee was held in November 1982; rather, in January 1983 the County rescheduled the election for March 15, 1983. At the same time, the County selected the August 16-31, 1982 period as the filing period for the rescheduled, March election (J.S. App. 7a). Because Act No. 549, as submitted to the Attorney General, provided for an August filing period for candidates *for a November election*, his approval of that legislation cannot be deemed clearance of the County's subsequent selection of the August 1982 filing period for the March election (or any ensuing elections).[10]

[10] In our view, a filing date for candidates cannot be viewed in isolation from the particular election for which the candidates are filing. Cf. *Local 3489, United Steelworkers* v. *Usery*, 429 U.S. 305, 310-311 (1977). Accordingly, the use of an August 16-31, 1982 filing period for candidates for a March 1983 election was an innovation and, hence, a change within the meaning of Section 5—in contrast to a recurring fixed filing period (where repeated preclearance would not be required). In any event, even if the qualifying period itself did not require further approval, the March 15, 1983 election date requires preclearance, and one of the factors the Attorney General may take into account in considering the discriminatory effect or purpose of the rescheduled election date is the

CONCLUSION

The Court should note probable jurisdiction, reverse the judgment of the district court insofar as it failed to hold that the County violated Section 5 by not submitting for preclearance the August 1982 filing period for the March 1983 election and the March 15, 1983 election date itself, and remand the case for the entry of appropriate orders.[11]

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

MAY 1984

---

relation between the August filing period and the March election date.

[11] As noted above (note 6, *supra*), this Court has held that in certain circumstances the appropriate remedy for failure to preclear a voting change is not automatically to invalidate an entire election, but rather to afford the offending jurisdiction a reasonable opportunity within which to seek approval of the change. *Berry* v. *Doles*, 438 U.S. at 192-193; *Perkins* v. *Matthews*, 400 U.S. at 396-397. The suggested relief provides a practical solution to avoid temporary uncertainty concerning the governance of the County's school system. If the County should submit the March election date for retroactive clearance, and if it were granted, the election would stand. If, on the other hand, the County fails to make a prompt submission or, if preclearance is requested but denied, the election could be invalidated. The proposed relief thus avoids uncertainty at least until the County's submission can be considered.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 555

Office - Supreme Court, U.S.
FILED
JUN 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., *et al.*,
Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

SUPPLEMENTAL BRIEF OF THE APPELLANTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JOHN R. HARPER II *
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

JACK GREENBERG
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015
(202) 244-3151

Counsel for Appellants

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES:	Page
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	6
Berry v. *Doles*, 438 U.S. 190 (1978)	5
Louisiana v. *United States*, 380 U.S. 145 (1965)	6
McCain v. *Lybrand*, —— U.S. —— (Feb. 21, 1984)	2
Perkins v. *Matthews*, 400 U.S. 379 (1971)	*passim*
STATUTE:	
42 U.S.C. § 1973b(a)(1)(D)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1015

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., *et al.*,
Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

SUPPLEMENTAL BRIEF OF THE APPELLANTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

I

Appellants concur in the suggestion of the United States that, while the decision below is inconsistent with the opinions of this Court and must therefore be reversed, the issues are neither so novel nor so complex as to require plenary consideration by this Court. The Department of Justice, which has administrative responsibility for enforcing section 5, particularly challenges the district court's holdings that (1) setting an election date

and a candidate qualifying period are not voting changes covered by section 5, and (2) that the Attorney General's preclearance of a new law carries with it "advance preclearance of future unspecified changes" that may occur in the implementation of that law. Brief for the United States, p. 13. The United States persuasively demonstrates that these holdings are wrong and should be summarily reversed.

The errors of the district court have been underlined by this Court's recent decision in *McCain v. Lybrand*, —— U.S. —— (Feb. 21, 1984). In that case this court reiterated the longstanding holdings that *all* voting changes must be submitted under the Voting Rights Act, and that voting changes can not be precleared unless they were explicitly submitted to and evaluated by the Attorney General. In light of the *McCain* decision the judgment of the district court in this case can be reversed without extended discussion. Summary reversal this Term is necessary if the possibility of a new election in 1984 is to be left open.

II

This Court need not consider nor address the issue of what action the district court should take if on remand the defendants in fact request preclearance of the voting changes which have occurred, and if such preclearance is granted. Whether such submission and preclearance will occur is at this point a matter of conjecture. Should both occur, the appropriate remedy will depend on the particular circumstances of the case. Under the rule of *Perkins v. Matthews*, 400 U.S. 379 (1971), in certain circumstances a premature election should be set aside even if it is precleared after the fact, while in other circumstances it should not. This issue should be addressed in the first instance by the district court in light of a factual record which does not now exist.

Therefore, appellants suggests that this Court, if it reverses the judgment below, should simply direct the lower court on remand to order appropriate relief in accordance with normal principles of equity.

The United States, however, appears to suggest, p. 16 n.11, that this Court should specify in its order of reversal that if on remand the Hampton County changes are submitted and precleared there should be no new election.[1] In the appellants' view, including such a provision in this Court's order at this stage would be not only unnecessary but would conflict in several major respects with this Court's decision in *Perkins v. Matthews, supra.*

If the United States simply means that the circumstances in this case (which it does not specify) warrant such relief, then, according to *Perkins* and traditional practice, that issue and those circumstances should first be considered by the district court. 400 U.S. at 397. Appellants believe that the 1983 election should be set aside even if the changes are now precleared. There are a number of factors in this case which strongly militate in favor of a new election, such as those described below at

---

[1] The United States' suggestion of the conditional order appears to be based upon its view that the Attorney General can grant "retroactive preclearance" decision, Brief for the United States as Amicus Curiae, p. 11 n.6, which pre-empts the equity court's decision on relief. Whatever the merits of that view, it is not one which need be or should be considered by this Court now, when there has been no submission or preclearance. It is worth noting, in any event, that the Attorney General's decision, under the statute, is far different from the question faced by an equity court. He is to decide whether a change is racially discriminatory in purpose or effect. The equity court, on the other hand, having found a violation, must decide what remedy is adequate to redress the violation. Such remedy questions, unless amounting to racial discrimination, are not part of the Attorney General's charter under the Voting Rights Act, so that making relief depend upon the preclearance determination leaves *both* the Attorney General and the equity court without jurisdiction to order retroactive relief for an illegal election.

p. 6 and nn. 4 & 5, and we are entitled to be heard on this issue, just as the appellees should be heard if they argue that a new election should not be held.

If the United States' suggestion is read to mean that, as a general matter, the Attorney General's subsequent decision to preclear a change should preclude a district court from ordering a new election as a remedy for illegal implementation of the change (*i.e.*, implementation of the change before preclearance), there is even more reason for this Court not to accept the suggestion because it would raise serious issues affecting the Voting Rights Act. Such a standard would effectively overrule the *Perkins* holding which requires a number of factors to be taken into account. It would also violate the language and intent of the Voting Rights Act and would be inconsistent with longstanding principles of equitable relief.

1. In *Perkins*, when this Court considered what remedy should follow the holding of an election in which unprecleared changes were enforced, its first consideration was Congress' strong interest in achieving compliance with the Act's preclearance requirement. 400 U.S. at 396. The Court left the fashioning of the remedy to the district court on remand, while listing some other types of factors to be considered *along with* Congress' strong desire to achieve compliance, "such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5." Id. at 396. The option of ordering a new election only if the change at issue did not receive preclearance was cited as an example of relief that might be appropriate "in certain circumstances." *Ibid.* Making such an option the general rule would radically alter the remedial scheme of *Perkins*.[2]

[2] Significantly, on remand, even though all the changes involved in *Perkins* were precleared, the district court still ordered new elections for two of the four City Council seats that had been filled in the illegal election. *Perkins* v. *Matthews*, 336 F. Supp. 6 (S.D. Miss. 1971). See also Perkins v. Matthews, supra, Supplemental Judgment (S.D. Miss. June 19, 1972) (copy lodged with the clerk).

In Berry v. Doles, 438 U.S. 190 (1978) (per curiam), it was held that the circumstances of the particular case warranted use of the option referred to in *Perkins*.

2. This Court's emphasis in *Perkins* on compliance with the preclearance requirement was solidly based on the language and intent of Congress. Section 5 of the Voting Rights Act provides that no voting change can be implemented "unless and until" preclearance is obtained. The Act is violated not only substantively—by changes determined to be discriminatory—but also procedurally—by enforcement of any changes (discriminatory or not) which have not been precleared. As the years have passed since *Perkins*, compliance with the procedural requirement of preclearance has remained a serious problem, and the record of widespread non-compliance was one of the principle reasons for extending the Act again in 1982. In fact, Congress regarded enforcement of unprecleared changes as such serious violations (regardless whether the change so enforced was eventually precleared or not) that it made any instance of such illegal enforcement a bar to bailout. Section 4(a)(1)(D), 42 U.S.C. § 1973b (a)(1)(D).

A conditional order making the holding of a new election turn on whether a change implemented without preclearance is later determined to be discriminatory would essentially read the "procedural" requirement of preclearance out of the Voting Rights Act, by denying any relief for a violation of this requirement unless it were coupled with a violation of the "substantive" standards of the Act. Such a reading is fundamentally inconsistent with the Act, especially as Congress has strengthened it in 1982.

3. In fashioning relief for violations of federal law, the courts are to act in accordance with the broad, his-

toric equity power to grant full and effective relief. As this Court recently held in an analogous situation, full relief "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).[3] A district court fashioning a remedy for a section 5 violation can of course properly consider the fact that the disputed voting change is subsequently precleared, but only as one of several factors. In this case, for example, the district court could consider not only that Hampton County officials knew at all times that preclearance was required, but also the fact that the violation materially affected the results to the prejudice of black voters, since several black candidates were barred from qualifying to run in the election.[4] Factors like these are traditional considerations for a court deciding what relief to grant,

[3] See also Louisiana v. United States, 380 U.S. 145 (1966), and other cases collected in Albemarle Paper Co., supra, at 415-22.

[4] See affidavit of Benjamin Brooks, March 10, 1983, filed in the district court on May 12, 1983, with the appellants' Motion for Temporary Restraining Order and Preliminary Injunction.

The unfairness of the election was recognized at the hearing on the motion for a temporary restraining order:

> "Q. BY THE COURT. Well, as Chairman of the Hampton County Board of Education, is it your position that you feel, under all the circumstances that exist, that this election should go forward tomorrow?
>
> "A. Judge, I don't know how to answer that, sir. I feel in view of the information that was furnished to me by the [South Carolina] Attorney General's office, that perhaps it should. From a realistic standpoint, sir, I can't tell you that I do agree with that, sir, from one standpoint. I don't know that I don't think it would be more fair to open up filing for this thing. But I am bound by the governing bodies of my state. I am appointed by the state. I have got to listen to what the Attorney General of my state tells me to do, sir. And that is what I have done." [Transcript, May 14, 1983, pp. 49-50.]

and there is no reason why relief under the Voting Rights Act should be more limited.[5]

Thirteen years after *Perkins*, and in the wake of a brand-new congressional determination that the problem of non-submissions is still intolerable, the standards for allowing illegal elections to stand should be more stringent, not less so. Voluntary compliance depends upon the threat of enforcement as a penalty for non-compliance. If there is no threat that an illegal election will be set aside, there is *no* incentive on a jurisdiction to comply, because the jurisdiction knows that it will *never* be worse off for violating the law than for obeying it.

Appellants do not ask this Court to order a new election as a remedy for the violation in this case. We simply ask that this Court refrain from precluding it, and

[5] The single district judge, in declining a TRO to halt the election, acted on the assumption that the election would later be set aside:

> "But I do feel that by my refusing to issue the temporary restraining order, I'm doing it because I think it comes awfully late in the game, and I also do not see where there is any irreparable harm or damage to the plaintiffs, or any person that they would purport to represent who would want to run because, if the Courts eventually decide that the proceedings conducted, the election conducted by the county are proper and legal, then there is no harm done. If the Court should ultimately decide to the contrary, then of course, this election will be thrown out and the plaintiff's rights would be protected and they would have the right to run in a future election that could be held." [Transcript, May 14, 1983, pp. 54-55.]

allow that remedy to be open to the district court in accordance with normal principles of equity.

Respectfully submitted,

JOHN R. HARPER II *
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 799-2798

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

JACK GREENBERG
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015
(202) 244-3151

Counsel for Appellants

* Counsel of Record

No. 83-1015

Office - Supreme Court, U.S
FILED
AUG 3 1984

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL., APPELLANTS

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

BARBARA E. ETKIND
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the scheduling of a qualifying period for candidates and the setting of a date for an election are "changes" subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether, when he withdrew his objection to Act No. 549, the Attorney General precleared the scheduling thereafter of a special election to be held on March 15, 1983, or the use of an already expired August 1982 qualifying period for that election.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Opinion below	2
Jurisdiction	2
Statement	2
Summary of argument	7
Argument:	
I. The scheduling of a filing period for candidates and the setting of an election date are changes subject to Section 5 preclearance	10
II. The withdrawal by the Attorney General of his objection to Act No. 549 did not preclear the changes in the dates of the election or the qualifying period	15
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544....8, 11, 12, 13, 17
Berry v. *Doles*, 438 U.S. 190 ..... 7, 21
Blanding v. *DuBose*, 454 U.S. 393 11
Dougherty County Board of Education v. *White*, 439 U.S. 32 .....11, 12, 13, 19
Georgia v. *United States*, 411 U.S. 526 19
Hadnott v. *Amos*, 394 U.S. 358 12
Local 3489, United Steelworkers v. *Usery*, 429 U.S. 305 20
McCain v. *Lybrand*, No. 82-282 (Feb. 21, 1984).... 17
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 15
Perkins v. *Matthews*, 400 U.S. 379 .....11, 12, 13, 21
Udall v. *Tallman*, 380 U.S. 1 15
United States v. *Clark*, 454 U.S. 555 15
United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 .....9, 11, 13, 17

Constitution, statutes and regulations:	Page
U.S. Const.:	
Amend. XIV	3
Amend. XV	3
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:	
§ 2, 42 U.S.C. 1973	3
§ 5, 42 U.S.C. 1973c	*passim*
Act of Feb. 18, 1982, Act No. 547, 1982 S.C. Acts 3495	3, 4, 5
Act of Apr. 9, 1982, Act No. 549, 1982 S.C. Acts 3497	*passim*
28 C.F.R. Pt. 51:	
Section 51.4(a) (1972)	14
Section 51.8	18
Section 51.11	11, 14
Section 51.12(g)	12-13
Section 51.12(i)	16
Section 51.20	5
Section 51.26	19
Section 51.26(f)	19
Section 51.27	18
Section 51.35	18
Section 51.37	18
Miscellaneous:	
36 Fed. Reg. (1971):	
p. 18186	14
p. 18187	14
H.R. Rep. 94-196, 94th Cong., 1st Sess. (1975)	13
H.R. Rep. 97-227, 97th Cong., 1st Sess. (1981)	13
S. Rep. 94-295, 94th Cong., 1st Sess. (1975)	13
S. Rep. 97-417, 97th Cong., 2d Sess. (1982)	13
Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965)	12

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1015

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL., APPELLANTS

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

On February 21, 1984, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a brief urging summary reversal, and the Court noted probable jurisdiction on June 18, 1984.

This case raises questions concerning the preclearance of voting changes pursuant to the Attorney General's enforcement responsibilities under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General must review

changes in election laws submitted by covered jurisdictions in order to determine whether such changes have either the purpose or the effect of denying or abridging the right to vote on account of race or color. The Attorney General has authority under the Act to initiate suits to prevent implementation of changes in election laws prior to compliance with the preclearance procedures of Section 5. See Section 12(d), 42 U.S.C. 1973j(d). The Court's resolution of the questions presented in this case will affect the Attorney General's execution of these statutory responsibilities.

OPINION BELOW

The order of the three-judge district court (J.S. App. 1a-11a) is not reported.

JURISDICTION

The order of the three-judge district court was entered on September 9, 1983 (J.S. App. 1a). A notice of appeal was filed on Monday, October 10, 1983 (J.S. App. 12a-13a). By order of December 7, 1983, the Chief Justice extended the time in which to docket the appeal to December 16, 1983, and the appeal was docketed on that date. The Court noted probable jurisdiction on June 18, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1253.

STATEMENT

Appellants, two civil rights organizations and several residents of Hampton County, South Carolina, filed this action in the United States District Court for the District of South Carolina on March 11, 1983, to enjoin the holding of elections for two boards of trustees of the Hampton County public schools. Appellants alleged that the County had not

received preclearance from the Attorney General under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to conduct the elections. A three-judge court declined to enjoin the scheduled March 15, 1983 election and, on September 9, 1983, issued an order denying appellants' request for further injunctive relief and dismissing their complaint insofar as it sought relief under Section 5. J.S. App. 1a-11a.[1]

1. Prior to 1964, the Hampton County public schools were governed by a six-member County Board of Education (the County Board). The members of the County Board were appointed by the Hampton County delegation to the South Carolina legislature. The County Board, in turn, appointed two six-member Boards of Trustees, each of which administered one of the County's two separate school districts. The County's voters elected at-large a County Superintendent to serve as an advisor to the teachers and the trustees of the two school districts. J.S. App. 2a.

On February 18, 1982, the South Carolina General Assembly passed Act No. 547, 1982 S.C. Acts 3495 (J.S. App. 17a-18a), which restructured the mode of governance of the Hampton County school system. Specifically, Act No. 547 provided that beginning January 1, 1983, the County Board was to be composed of six members who were to be elected at-large, rather than appointed. The Superintendent, who would continue to be elected at-large, was to serve as an ex officio member of the Board, with all of the rights and privileges of the other members,

---

[1] Appellants also alleged violations of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Those claims are still pending in the district court. J.S. 6 n.3.

including the right to vote. J.S. App. 2a-3a. The first elections for the newly constituted Board were to be held in November 1982. As the three-judge court found (*ibid.*), the purpose of electing, rather than appointing, the County Board members was to create a Board that would be responsive to the consolidation of the County's two separate school districts. Act No. 547 was submitted for preclearance by the Attorney General pursuant to Section 5, and the Act was precleared on April 28, 1982 (J.S. App. 3a).

On April 9, 1982, however, legislation was enacted to overturn Act No. 547. Act No. 549, 1982 S.C. 3497 (J.S. App. 19a-21a), abolished the County Board and the office of Superintendent and turned governance of the Hampton County public schools over to the two boards of trustees. Act No. 549 further provided that, beginning with the November 1982 general election, the trustees of each of the two school districts were to be elected at-large by a plurality of the voters in each respective district. Act No. 549 also reduced the number of trustees serving on each board from six to five and required every candidate for election in November 1982 to file with the Hampton County Election Commission during the period August 16-31, 1982. Implementation of Act No. 549 required approval by a majority of the qualified voters of Hampton County in a referendum to be held in May 1982. On May 25, 1982, the Hampton County Election Commission conducted the required referendum and a majority of the voters approved Act No. 549. J.S. App. 3a-4a.

The County submitted Act No. 549 for Section 5 preclearance by the Attorney General on June 16,

1982.[2] On August 16, 1982, while the request for preclearance was pending, the County began accepting filings under Act No. 549 for the position of trustee. On August 23, the Attorney General interposed an objection to Act No. 549, stating that he was unable to conclude that abolition of the County Board did not discriminate against black residents of Hampton County. The Election Commission nevertheless continued to accept filings for the election of trustees under Act No. 549, as well as filings for the election of County Board members under Act No. 547. On September 1, 1982, the County requested the Attorney General to reconsider his objection to Act No. 549. J.S. App. 4a-5a.

As of November 2, 1982, the Attorney General had not responded to the County's request for reconsideration of his objection to Act No. 549. Accordingly, the County proceeded on that date, pursuant to Act No. 547, to hold elections for the offices of County Board members and Superintendent of Education. On November 19, 1982, the Attorney General withdrew his objection to Act No. 549. Thereafter, on the advice of the South Carolina Attorney General, the Election Commission scheduled a special election for March 15, 1983, to select the trustees of the boards of the two school districts. Only those candidates who had filed for these positions during the

---

[2] Although Department of Justice regulations expressly authorize submission and preclearance of "a change for which approval by referendum * * * is required * * * if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken" (28 C.F.R. 51.20), the County waited until approximately three weeks after the referendum to submit Act No. 549 for preclearance by the Attorney General. The Attorney General received the submission on June 24, 1982 (J.S. 4).

August 1982 qualifying period were permitted to stand for election. One black and four white trustees were elected to the District One Board; all five trustees elected to the District Two Board are black. J.S. App. 5a-7a & n.2.

2. Appellants sought to enjoin the holding of the scheduled March 15, 1983 election on the grounds, inter alia, that the County had violated or would violate Section 5 by:

1. Continuing to accept filings for the trustee positions after the Attorney General had objected to Act No. 549;
2. conducting an election for trustees without seeking authority for a filing period;
3. conducting an election for trustees without holding a filing period subsequent to the Attorney General's withdrawal of his objection to Act No. 549;
4. conducting an election for trustees on a date other than that specified in Act No. 549; and
5. abolishing the office of Superintendent of Education and transferring his duties to the two boards of trustees.[3]

Concluding that the County had complied with its obligations under Section 5, the three-judge court refused to enjoin the scheduled election and, by order dated September 9, 1983, denied any further injunctive relief (J.S. App. 8a-11a). The court held (*id.* at 9a) that the first four actions challenged by appellants were not changes within the meaning of Section 5, but merely "the ministerial acts necessary to accomplish [Act No. 549's] purposes." Even assuming these actions were Section 5 changes, the court concluded (J.S. App. 9a-10a) that the Attorney General had precleared them when he withdrew his objection to Act No. 549. Relying on this court's decision in *Berry* v. *Doles*, 438 U.S. 190 (1978), for the proposition that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval" (J.S. App. 10a), the court held (*ibid.*) that "the eventual preclearance of Act No. 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished."

Finally, the court held (J.S. App. 10a-11a) that the abolition of the office of Superintendent of Education and the devolution of his duties upon the boards of trustees of the two school districts had been provided for by Act No. 549 and therefore were precleared by the Attorney General when he withdrew his objection to the Act.

[3] Appellants have abandoned their further contention that the County violated Section 5 by holding the election for trustees without first certifying the results of the May 1982 referendum to the South Carolina Code Commissioner, as required by Act No. 549 (J.S. 6 n.2).

SUMMARY OF ARGUMENT

The district court failed to follow this Court's consistent admonition that all changes in voting practices and procedures must be unambiguously submitted and precleared before they can be implemented by jurisdictions covered by Section 5 of the Voting Rights Act.

I

The district court held that the scheduling of a filing period for candidates and the setting of an election date were not changes subject to Section

5 preclearance because they were simply "ministerial acts" necessary to implement a new law. Section 5, however, provides no exception from its preclearance requirement for such "ministerial acts." To the contrary, this Court has consistently construed the statutory language as reaching "*any* state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969) (emphasis added). Applying this construction of the statute, the Court has required Section 5 preclearance of such changes as the relocation of polling places. For the same reasons that a change in the location at which an election is held is a change within the meaning of Section 5, a change in the timing of an election also is subject to the preclearance requirement. Moreover, the Court has expressly held that the preclearance requirement applies to changes in the requirements for candidate qualifications.

In addition, the Attorney General, the official charged with the administration of Section 5, has consistently construed that statute as applying to the types of changes in voting practices and procedures that are involved in this case. His consistent course of administrative interpretation and practice is entitled to considerable deference.

II

The district court erred in holding that the Attorney General precleared the changes at issue here when he withdrew his objection to Act No. 549, which provided for the selection of school board trustees at the general November 1982 election and established an August 16-31, 1982 qualifying period for candidates for that election. This Court has frequently emphasized (*United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 136 (1978)) that "the purposes of the [Voting Rights] Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." In this case, when the Attorney General withdrew his objection to Act No. 549 on November 19, 1982, he was aware, *at most*, that the submitted election date had passed and that a new date would have to be set. Such knowledge does not constitute preclearance of a new election date that was never submitted and, indeed, was yet to be set at the time of the alleged approval.

Likewise, the Attorney General's withdrawal of his objection to Act No. 549 did not preclear the selection of the August 16-31, 1982 filing period for candidates for the rescheduled election. While Act No. 549, as submitted to the Attorney General, provided for an August 16-31, 1982 filing period, that filing period was for candidates for the November 1982 election. As discussed above, however, the election for school board trustee members was not held in November 1982. The Attorney General's approval of a filing period for candidates for a specified election date cannot be deemed also to constitute approval of the same filing period for a different election date that was never submitted to him.

ARGUMENT

I. THE SCHEDULING OF A FILING PERIOD FOR CANDIDATES AND THE SETTING OF AN ELECTION DATE ARE CHANGES SUBJECT TO SECTION 5 PRECLEARANCE

The district court held that the County's scheduling of a filing period for candidates and setting of a date for the election itself are not changes subject to Section 5 preclearance because they were simply "ministerial acts" necessary to implement a new law. But neither the language of Section 5 nor this Court's broad construction of it leaves room for any exception from the preclearance requirement for such "ministerial" acts.

Recognizing the discriminatory potential inherent in changes in voting practices and procedures, Congress determined that before certain jurisdictions would be permitted to put any such changes into effect the changes would have to be precleared either by the United States District Court for the District of Columbia or the Attorney General. Section 5 of the Voting Rights Act of 1965 thus requires Hampton County, as a covered jurisdiction, to obtain a declaratory judgment from the United States District Court for the District of Columbia or preclearance from the Attorney General whenever it

> enact[s] or seek[s] to administer *any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964.

42 U.S.C. 1973c (emphasis added).

In order to achieve the prophylactic purpose of Section 5, this Court has consistently construed the

statutory language to reach "*any* state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. at 566 (emphasis added). In so doing, the Court has recognized (*id.* at 568) Congress's "intention that all changes, no matter how small, be subjected to § 5 scrutiny."

This broad interpretation of Section 5 is buttressed by the regulations pursuant to which the Attorney General enforces Section 5.[4] They too emphasize that

> [a]*ny* change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

28 C.F.R. 51.11 (emphasis added).

Applying this construction of the statute, this Court has required Section 5 preclearance of such changes as the relocation of polling places, on the ground that (*Perkins* v. *Matthews*, 400 U.S. 379, 387 (1977)): "The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise."

---

[4] Recognizing "the central role of the Attorney General in formulating and implementing § 5," the Court has accorded "particular deference" to his interpretation of the scope of the provision, as codified in the regulations. *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 39 (1978). See also *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 138.

For the same reasons that a change in the location at which an election is held is a change within the meaning of Section 5, a change in the timing of an election also is subject to the preclearance requirement.

In addition, in holding that the relocation of polling places is a change covered by Section 5, the Court in *Perkins* relied (400 U.S. at 387-388) on legislative history that makes clear that Section 5 also was intended to cover a change from voting by ballot to voting by machine. *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 61-62, 95 (1965). See also *Allen* v. *State Board of Elections*, 393 U.S. at 568. Surely the setting of dates for candidate qualification and the scheduling of the election itself are no more "ministerial" than is a change from paper ballots to voting machines.

Moreover, the Court has expressly held that the preclearance requirement of Section 5 applies to changes in the requirements for candidate qualifications. In both *Hadnott* v. *Amos*, 394 U.S. 358, 365-366 (1969), and *Allen* v. *State Board of Elections*, 393 U.S. at 551, 570 (*Whitley* v. *Williams*), the Court required preclearance of a change in the date by which an independent candidate was required to file a declaration of his candidacy.[8] See also 28 C.F.R.

[8] Indeed, in a subsequent decision holding preclearance required for the imposition of a financial impediment to candidacy, the Court reasoned that the rule there at issue "erects 'increased barriers' to candidacy as formindable as the filing date changes at issue in" *Hadnott* and *Allen*. *Dougherty County Board of Education* v. *White*, 439 U.S. at 43. The Court also analogized the rule there at issue to the "inhibition on entry into the elective process" resulting from "filing-fee changes * * * to which the Attorney General has

51.12(g) (describing as a change subject to preclearance "[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices"). These authorities make clear that the County's adoption of the August 16-31, 1982 filing period for candidates to be elected in March 1983 was a change subject to the preclearance requirement of Section 5.[8]

Accordingly, the computerized Department of Justice Section 5 files reveal that, since 1980, approximately 58 changes in election dates and approximately 10 changes in dates for candidate qualifying periods have been submitted to the Attorney General for Section 5 preclearance. Our records show that the Attorney General considered each of these submissions to represent a "change" within the meaning of Section 5. For example, the Attorney General interposed objections to two of the latter types of changes: to one, on the ground that there had been insufficient public notice of the change until shortly before the

successfully interposed objections." *Id.* at 40. The selection of an already-expired qualifying period obviously has no less potential for impeding candidacy.

[8] In committee reports accompanying its enactment of extensions of the expiration date of the Voting Rights Act, Congress has repeatedly cited with approval the broad interpretation of the Act's coverage contained in *Allen* v. *State Board of Elections* and *Perkins* v. *Matthews*. See H.R. Rep. 94-196, 94th Cong., 1st Sess. 9 (1975); S. Rep. 94-295, 94th Cong., 1st Sess. 16 (1975). Accordingly, this Court has reaffirmed these prior holdings in *United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 122-123, and *Dougherty County Board of Education* v. *White*, 439 U.S. at 37-40. See also S. Rep. 97-417, 97th Cong., 2d Sess. 8 (1982); H.R. Rep. 97-227, 97th Cong., 1st Sess. 6 (1981).

qualification period began; and to the second, on the ground that the requirement that independent candidates must qualify at the same time as political party candidates would discriminate against black candidates (who had constituted the vast majority of independent candidates) and their constituents.[7] These examples of the Attorney General's practice, together with the regulations previously discussed,[8] manifest a consistent course of construction by the official charged with the administration of the statute

[7] An objection also was interposed to one of the 58 submitted changes in election dates. The basis for that objection was that, while the submitted change in election date would coincide with an election for local school board members in which a significant number of non-minority voters could be expected to participate, it would not coincide with the date on which the predominant proportion of minority voters would be voting for local school board members.

When a jurisdiction submits a purported "change" in voting practice or procedure that the Attorney General does not consider to be covered by Section 5, he so advises the jurisdiction. No such advice was given with respect to any of the 68 submissions we have surveyed. To the contrary, with the exception of those jurisdictions whose submissions are still pending, each jurisdiction was sent a letter advising either that the submitted change had been precleared or that an objection to it had been interposed.

[8] The substance of 28 C.F.R. 51.11 (discussed at page 11, *supra*) was initially promulgated in 1971, as part of the first regulations implementing Section 5 (28 C.F.R. 51.4(a) (1972); 36 Fed. Reg. 18186, 18187 (1971)):

> All changes affecting voting, even though the change appears to be minor or indirect, to expand voting rights or to remove the elements which caused objection by the Attorney General to a prior submission, must either be submitted to the Attorney General or be made the subject of an action for declaratory judgment in the U.S. District Court for the District of Columbia.

that is entitled to considerable deference.[9] See *United States* v. *Clark*, 454 U.S. 555, 565 (1982); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The danger inherent in recognizing an exception to Section 5 coverage for "ministerial" acts is evident. Potential for discrimination exists not only in the practices and procedures surrounding the actual casting of ballots, but equally in the more mundane steps preliminary to the election itself. Under the interpretation of the Act adopted by the district court a covered jurisdiction could obtain preclearance of a general statute without specifying the steps necessary for its implementation. Thereafter it would be free to implement the statute through steps that had the purpose or effect of discriminating against minority voters. Such a result clearly is contrary to the very purpose of Section 5.

II. THE WITHDRAWAL BY THE ATTORNEY GENERAL OF HIS OBJECTION TO ACT NO. 549 DID NOT PRECLEAR THE CHANGES IN THE DATES OF THE ELECTION OR THE QUALIFYING PERIOD

A distinct question is whether the changes at issue were precleared when the Attorney General withdrew his objection to Act No. 549. For the reasons discussed below, we agree with appellants that they were not.[10]

[9] Although our computerized Section 5 files extend back only to 1980, we are advised by longstanding Civil Rights Division staff that the types of changes at issue here—scheduling of election dates and qualifying periods—have always been treated by the Attorney General as covered by the preclearance requirement of Section 5.

[10] We agree with the district court (J.S. App. 10a-11a) that the abolition of the office of Hampton County Superin-

A. In our view, the district court erred as a matter of both fact and law in holding that the Attorney General's withdrawal of his objection to Act No. 549 precleared the setting of the March 1983 election date. As a matter of fact, the district court clearly erred in viewing the setting of the March 1983 election date as an "act[] of implementation [of Act No. 549] which had already been accomplished" (J.S. App. 10a) at the time of the November 19, 1982 withdrawal of objection. To the contrary, as the district court itself elsewhere found (*id.* at 7a-8a), the March 15, 1983 election date was not set until January 1983, two months *after* the Attorney General withdrew his objection.

Moreover, the consistent decisions of this Court preclude the conclusion that the withdrawal by the Attorney General of his objection constituted an implicit preclearance of an election date to be set sometime in the future. The Court has frequently emphasized

---

tendent of Education and the devolution of his duties on the boards of trustees were specifically provided for by Act No. 549 and therefore were precleared when the Attorney General withdrew his objection to that Act. Appellants alleged in the district court, however, that the Superintendent was prematurely stripped of his duties and authority (J.S. 12). We lack sufficient knowledge to determine whether this action requires further Section 5 clearance. To the extent that the Superintendent's loss of responsibility is an inevitable and foreseeable consequence of the abolition of the County Board which he served, the change has been precleared. If, however, the County has abolished the office of Superintendent prior to June 30, 1985, contrary to Act No. 549, it has shortened the term of an elected official and must seek clearance of the change under Section 5. See 28 C.F.R. 51.12(i) (defining as a change subject to preclearance "[a]ny change in the term of an elective office or an elected official or in the offices that are elective").

(*United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 136) that

> the purposes of the [Voting Rights] Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.

Accord, *McCain* v. *Lybrand*, No. 82-282 (Feb. 21, 1984), slip op. 12; *Allen* v. *State Board of Elections*, 393 U.S. at 571 ("[a] fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act"). In this case, when the Attorney General withdrew his objection to Act 549 on November 19, 1982, he was aware, *at most*, that the submitted election date had passed and that a new date would have to be set. Under the foregoing authorities, such knowledge decidedly does not constitute preclearance of an election date that was never submitted and, indeed, was yet to be set at the time of the alleged approval.[11]

---

[11] The same authorities undermine appellees' reliance (Mot. to Dis. or Aff. of Hampton County School Districts 18) on the Attorney General's failure to note in his letter withdrawing his objection to Act No. 549 that the setting of a new election date would be subject to further submission. Section 5 clearly places the burden of submitting a voting change on the covered jurisdiction, regardless of whether the Attorney General has made a specific request for a submission.

Appellees have never claimed that they submitted the March 15, 1983 election date for preclearance. Rather, in addition to the spurious "implicit preclearance" argument answered in the text above, they argue that the establishment of a new date for the election was not a change and that, as a practical

Advance preclearance of future, unspecified changes thus is contrary to the basic concept of Section 5. It is also inconsistent with the practicalities of administering the statute. In the small percentage of cases in which an objection is interposed, the objection is based not on abstract surmise, but rather on the practical realities of the specific changes proposed, which often are brought to the Attorney General's attention by members of the communities that will be affected by the change. For example, the objections interposed to the changes in qualifying periods and election date discussed above (pages 13-14 & note 7, *supra*) all were based, at least in part, on information and comments received by the Attorney General from other "interested parties." Indeed, the Attorney General's regulations (28 C.F.R. 51.27) specifically provide for the submission of comments by interested individuals and groups.[12] Such comments obviously are most usefully addressed to specific

---

matter, submission of election dates for preclearance would be impossible, since the Attorney General might not respond before the scheduled date (Mot. to Dis. or Aff. of Hampton County Election Commission and Treasurer 17-21; Mot. to Dis. or Aff. of Hampton County School Districts 17-20). Because the Attorney General must respond to any submission within 60 days after he receives all of the necessary information (28 C.F.R. 51.8, 51.35, 51.37), however, a covered jurisdiction need only select an election date sufficiently far in the future to allow preclearance. Indeed, here, if appellees had made a complete submission of the date change in question at the time that change was made—January 1983—there is no reason to believe that the Attorney General's decision could not have been made prior to the scheduled March 15 election date.

[12] The regulations also advise jurisdictions having a significant minority population that "[r]eview by the Attorney General will be facilitated if", in addition to the information

changes that are proposed in the jurisdiction's submission. Hence, the entire administration of the Act would be undermined if as yet unspecified future changes were held precleared by implication at the time of preclearance of related legislation. As this Court has reiterated, Section 5 is concerned "'with the reality of changed practices as they affect Negro voters.'" *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 41 (1978) (quoting *Georgia* v. *United States*, 411 U.S. 526, 531 (1973)).

B. For the same reasons, the withdrawal by the Attorney General of his objection to Act No. 549 also did not preclear the setting of the August 16-31, 1982 filing period for candidates for the rescheduled March 15, 1983 election. To be sure, Act No. 549, as submitted to the Attorney General and as approved by him when he withdrew his objection on November 19, 1982, provided for an August 16-31, 1982 filing period.[13] That filing period, however, was for "candi-

---

that is required to be submitted, they also provide "the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members who can be expected to be familiar with the proposed change or who have been active in the political process." 28 C.F.R. 51.26, 51.26(f).

[13] Act No. 549 provides in pertinent part (J.S. App. 19a-20a):

> Beginning with the general election in November, 1982, trustees for Hampton County School Districts Nos. 1 and 2 shall be elected by a plurality vote of the electors within their respective district qualified and voting at the general election for representatives. The number of trustees shall be five for each school district and their terms of office shall begin January 1, 1983. * * * A candidate for membership on a school board must reside in the school district he seeks to represent and all candidates offering for election in November, 1982, must file during the period August 16-31, 1982.

dates offering for election in November 1982" (note 13, *supra*). As discussed above (page 5, *supra*), because of the Attorney General's initial objection to Act No. 549, no election for trustee was held in November 1982; rather, in January 1983 the County rescheduled the election for March 15, 1983. At the same time, the County selected the August 16-31, 1982 period as the filing period for the rescheduled, March election (J.S. App. 7a). Because Act No. 549, as submitted to the Attorney General, provided for an August filing period for candidates *for a November election*, his approval of that legislation cannot be deemed clearance of the County's subsequent selection of the already expired August 1982 filing period for the March election (or any ensuing elections).[14]

---

[14] In our view, a filing date for candidates cannot be viewed in isolation from the particular election for which the candidates are filing. Cf. *Local 3489, United Steelworkers* v. *Usery*, 429 U.S. 305, 310-311 (1977) (pointing out, in union democracy context, that non-incumbent candidacy is likely to be stimulated by, and responsive to, issues that arise or become more pronounced "shortly before elections"). Accordingly, the use of an August 16-31, 1982 filing period for candidates for a March 1983 election was an innovation and, hence, a change within the meaning of Section 5—in contrast to a recurring fixed filing period (where repeated preclearance would not be required). In any event, even if the qualifying period itself did not require further approval, the March 15, 1983 election date requires preclearance, and one of the factors the Attorney General may take into account in considering the discriminatory effect or purpose of the rescheduled election date is the relation between the August filing period and the March election date.

CONCLUSION

The Court should reverse the judgment of the district court insofar as it failed to hold that the County violated Section 5 by not submitting for preclearance the August 1982 filing period for the March 1983 election and the March 15, 1983 election date itself, and remand the case for the entry of appropriate orders.[15]

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

BARBARA E. ETKIND
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

AUGUST 1984

---

[15] This Court has held that in certain circumstances the appropriate remedy for failure to preclear a voting change is not automatically to invalidate an entire election, but rather to afford the offending jurisdiction a reasonable opportunity within which to seek clearance of the change. *Berry* v. *Doles*, 438 U.S. 190, 192-193 (1978); *Perkins* v. *Matthews*, 400 U.S. at 396-397. Similarly, in numerous instances, the Attorney General has extended retroactive clearance to a belatedly submitted change that had already been put into effect. We do not address whether appropriate circumstances for retroactive clearance are presented by this case, since that question is properly addressed in the first instance to the equitable remedial authority of the district court. *Perkins* v. *Matthews*, 400 U.S. at 397.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10024

Office-Supreme Court, U.S.
FILED
AUG 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JOINT APPENDIX

T. TRAVIS MEDLOCK
Attorney General
TREVA G. ASHWORTH*
Senior Assistant Attorney
EMORY SMITH
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 758-2072

Counsel for Appellees Hampton County Board of Elections, et al.

KAREN LECRAFT HENDERSON*
Sinkler, Gibbs & Simon, P.A.
P.O. Box 11458
Columbia, South Carolina 29211
(803) 765-1885

Counsel for Appellees Hampton County School Board No. 1 and Trustees

JOHN R. HARPER, II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 771-4723

THOMAS I. ATKINS
MARGARET FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

J. LEVONNE CHAMBERS
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

*Counsel of Record

(Additional names of Counsel appear inside of cover)

APPEAL DOCKETED DECEMBER 16, 1983
PROBABLE JURISDICTION NOTED JUNE 18, 1984

BEST AVAILABLE COPY

79pp

LEE S. BOWERS*
P.O. Box 95
Estill, South Carolina 29918
(803) 625-3575

Counsel for Appellees Darnell DeLoach, et al.

BRUCE DAVIS*
P.O. Box 881
Camden, South Carolina 29020
(803) 432-2880

Counsel for Appellees Hampton County School Board No. 2 and Trustees

TABLE OF CONTENTS

PAGE

Relevant Docket Entries 1a

Complaint 3a

Answer of Hampton County Election Commission, *et al.* 27a

Answer of Hampton County School District Number One, *et al.* 33a

Amended Answer of Hampton County School District Number Two 41a

Letter of Gerald W. Jones to C. Havird Jones, Jr., April 27, 1982 ..... 50a

Letter of Gerald W. Jones to C. Havird Jones, Jr., April 28, 1982 ..... 52a

Letter of Gerald W. Jones to C. Havird Jones, Jr., June 2, 1982 ..... 53a

Act No. R 413 (1982) 55a

Letter of Gerald W. Jones to C. Havird Jones, Jr., June 4, 1982 ..... 56a

Letter of Gerald W. Jones to Marion S. Riggs, June 22, 1982 ..... 57a

Letter of William Bradford Reynolds to C. Havird Jones, Jr., August 23, 1982 ..... 58a

Letter of C. Havird Jones, Jr. to Representative Douglas E. McTeer, Jr., August 26, 1982 ..... 61a

PAGE

Letter of C. Havird Jones, Jr. to William Bradford Reynolds, August 31, 1982 ..... 63a

Letter of William Bradford Reynolds to C. Havird Jones, Jr., November 19, 1982 ..... 65a

Letter of Treva G. Ashworth to Randolph Murdaugh, III, January 4, 1983 ..... 67a

Affidavit of John W. Dodge, July 13, 1983 ..... 70a

Letter of Randolph Murdaugh, III to Daniel R. McLeod, November 29, 1982 ..... 74a

Relevant Docket Entries

Date	*Entry*
March 11, 1983	Summons and Complaint . . .
March 12, 1983	Motion . . . by pl[aintiff] for TRO and Prelim[inary] Inj[unction] . . .
March 14, 1983	Evidentiary Hearing . . . Motion for TRO—denied. Request for 3-judge court certification—granted.
April 3, 1983	Answer of defendants Darnell DeLoach. . . .
April 30, 1983	Answer of Defendants Hampton County Election Comm[ission]. . . .
May 1, 1983	Answer of defendants Hampton County School Dist[rict] No. 1.
May 2, 1983	Designation of Three Judge Court. . . .
June 13, 1983	3-Judge Court Hearing. . . .
June 17, 1983	Answer of def[endants] Hampton County School District No. 2 . . .
July 15, 1983	Motion . . . by def[endants] Hampton County School District No. 2 . . . for partial s[ummary] j[udgment] on the 1st cause of action . . .
July 21, 1983	3-Judge Court Hearing . . . case does not require 3-Judge panel. Pl[aintiffs'] request for preliminary injunction is denied.
September 9, 1983	Order . . . memorializing oral ruling from bench on 7-21-83, that 3-Judge Court is dissolved; and that the court denies pl[aintiffs'] request

Relevant Docket Entries

Date	*Entry*
	for injunctive relief and dismisses those portions of the Complaint which seek any relief from this Court under Section 5 of the Voting Rights Act of 1965. . . .
October 5, 1983	Amended answer of def[endants] Hampton County School Dist[rict] No. 2. . . .
October 11, 1983	Notice of Appeal of pl[aintiffs] of Order entered 9-9-83. . . .

Complaint for Declaratory and Injunctive Relief Filed March 11, 1983

1. *Jurisdiction*

1.

The Jurisdiction of this Court is invoked under 28 U. S. C. Sections 1331, 1343 (3), 1343 (4), and 2201 *et seq.*, this suit being authorized by 42 U. S. C. Sections 1973 c and 1983. A Court of three judges is required by section 1973 c.

2.

This is also a suit in equity under Section 2 of the Voting Rights Act of 1965, as amended, Pub. L. No. 97-205, Section 3, 96 Stat. 134 (1982), 42 U. S. C. Section 1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution for declaratory and injunctive relief against the implementation of an Act of the South Carolina Legislature to abolish the Hampton County Board of Education, to abolish the office of Hampton County Superintendent of Education, to devolve their respective duties upon the Trustees for Hampton County School Districts Numbers One and Two and against a scheduled election of Trustees pursuant to such Act and to declare the existence of the Hampton County School Board and the Office of Hampton County Superintendent of Education, the rights of persons elected as members of the Hampton County Board of Education on November 2, 1982, to assume their respective offices, and the consolidation of school districts within Hampton County under the jurisdiction of the Hampton County Board of Education.

3

This Court, as a Single Judge Court, has jurisdiction over this action pursuant to 42 U. S. C. Section 1973 j (f) and 28 U. S. C. Sections 1331, 1343, 344, 2201, and 2202.

II. *Parties*

4.

Plaintiff National Association for the Advancement of Colored People (NAACP), Inc., is an international organization engaged in activities which foster the protection of the civil rights and civil liberties of persons of African descent, promoting social, economic and political development of such persons, and generally advancing the cause of human rights. Plaintiff Hampton County, South Carolina, Branch of the National Association for the Advancement of Colored People is an integral component of the first mentioned Plaintiff.

5.

All individually named Plaintiffs are Black citizens of the United States and residents and electors of Hampton County, South Carolina.

6.

Plaintiffs Brooks, Gordon, and Dixon were duly elected as members of the Hampton County Board of Education on November 2, 1982 and are qualified and certified to assume the offices to which they have been elected.

7.

Plaintiff Jack J. DeLoach is the current President of the Hampton County Branch of the NAACP. Plaintiff James W. Fennell is the immediate past President of this organization.

8.

Plaintiffs Brooks, Gordon, Dixon, DeLoach, Jessie M. Taylor, McKay, Soletta Taylor, Carr, Hazel, Martin,

Garvin, and Williams are residents of the area of Hampton County which has traditionally comprised Hampton County School District Number Two.

9.

Plaintiffs Fennell, McQuire, Green and Capers are residents of the area of Hampton County, South Carolina which has traditionally comprised Hampton County School District Number One.

10.

Plaintiffs bring this action as a class action pursuant to Rule 23 (a) and (b) (2), Fed. R. Civ. P., on behalf of the class consisting of all black citizens and registered voters of Hampton County, South Carolina. As to such class, (1) the class is so numerous that Joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the Plaintiffs are typical of the class; (4) the representative Plaintiffs will fairly and adequately protect the interests of the class; and (5) the defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate preliminary and final injunctive and declaratory relief with respect to the class as a whole.

11.

The Defendant, Hampton County Election Commission is the public body politic charged with the responsibility of conducting elections within Hampton County, South Carolina. Pursuant to the provisions of an Act of the South Carolina Legislature, designated R 398, H3645, the Commission has scheduled an election on March 15, 1983, for Trustees for Hampton County School Districts Number One and Two. Defendant Murdaugh is Chairperson

and Defendants Sinclair, Wooten, and Smith are members of the Commission.

12.

Defendant Hampton County School District Number One is the public body politic and corporate which is charged with the responsibility for administering certain schools with Hampton County. Defendants Stanley, Bruker, Badger, Kessler, and Ulmer are Trustees for Hampton County School District Number One and are charged with the responsibility of performing certain duties placed upon them by authorization of the aforesaid Act R398, H365.

13.

The Defendant Hampton County School District Number Two is a public body politic and corporate which is charged with the responsibility for administering certain schools within Hampton County. Defendants Kevin D. Darnell, DeLoach, Risher, Farmer, Rushing and Long are Trustees of Hampton County School District Two and are charged with the responsibility of performing certain duties placed upon them by authorization of the aforesaid Act R398, H3645.

14.

Defendants Cohen, Wood, Hopkins, Crews, and Bowers are members of the Hampton County Council, which has jurisdiction over certain matters related to the schools of Hampton County.

15.

Defendant Tuten is the Treasurer of Hampton County and maintains custody and control of money expended for school purposes in Hampton County.

16.

All the individually named defendants are sued individually and in their official capacities.

17.

And all relevant time set out herein, defendants were and have been acting under color of the statutes, ordinances, regulations, customs and usages of the State of South Carolina and the County of Hampton, South Carolina.

III. *Factual Allegations*

18.

The Hampton County Election Commission, the Hampton County School Districts Number One and Two and Hampton County are political subdivisions to which the prohibitions of the Voting Rights Acts of 1965, 42 U. S. C. Section 1973 b (a), are in effect pursuant to the certification of the Attorney General of the United States under 42 U. S. C. Section 1973 b (b). 30 Fed. Reg. 9897.

19.

Defendants have the authority and duty to submit pursuant to 42 U. S. C. Section 1973 c, Section 5 of the Act, "any voting qualifications or prerequisite to voting, or standard, practice or procedure different from that in force or effect on November 1, 1964" to the Attorney General of the United States, or to institute an action in the United States District Court for the District of Columbia for a declaratory judgment that the qualification or prerequisite to voting or standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

20.

According to the 1980 Census, the population of Hampton County is 18,159 of whom 8,577 are white (47%), 9,945 are black (53%), and 197 are Spanish, and the total voting age population of Hampton County is 9,433 of whom 4,764 are black or other (51%) and 4,669 are white (49%).

21.

According to the 1980 Census and official voter registration figures, the black population and black voters are concentrated in the area which comprises School District Number Two.

22.

Prior to November 1, 1964, and continuing until November, 1982, the public school system of Hampton County was governed by the Hampton County Board of Education and administered by the elective Office of Hampton County Superintendent of Education. The county board was appointed by the County Legislative Delegation and, in turn, appointed Trustees to the Boards of Districts One and Two. The administrations of School Districts One and Two operated separately under the general supervision of the office of Hampton County Superintendent of Education.

23.

Prior to the 1970-1971 school year, both School Districts One and Two operated dual school systems based on race. However, by Orders of this Court entered on or about August, 1970, both school districts were required to implement desegregation plans. See, e.g., Exhibit Number Three. In compliance with this Order both school districts have been desegregated at all levels including student population, staff, faculty and administration.

24.

For the 1982-1983 school year there are enrolled in District Number One 1500 Black students (54%) and 1291 White students (46%). In District Number Two there are enrolled 1449 Black students (92%) and 124 White students (8%). Exhibit Number Five.

25.

During the school year 1981-1982, the funds budgeted per student by the Hampton County Council indicated a per student allocation of $252.16 for each student of District Number One and $248.65 for each student of District Number Two.

26.

The South Carolina Department of Education, in its March, 1978 Facility Needs and Administrative Services Survey of Hampton County District Two determined that certain deficiencies were present in District Two and recommended that the Hampton County Board of Education should consider a reorganziation of the systems within Districts One and Two which would provide administrative services to all county schools. The survey team supported a unified county administration with the following characteristics:

1. a single county Board of Education chosen by the direct vote of the people;

2. one District Superintendent appointed by the County Board of Education;

3. a centralized administrative office staffed by specialists charged with serving all county schools;

4. a unified tax base, providing stronger and more equitable support for both capital and operating expenditures.

Following the filing of this survey, efforts have been undertaken by the Hampton County Board of Education and School District Number Two to implement the recommendations of the survey.

27.

Circumstances since 1970 have combined to result in a situation where substantial inequities have developed between the educational opportunities available to citizens of Hampton County who reside in School Districts One and Two respectively. School District One where 91% of the White student population and 74% of the White voting population are resident, has been favored significantly by the official policy of the Hampton County Council and other policy making bodies. Hampton County School District Number Two with its 92% Black student population has become increasingly disadvantaged.

28.

Of the appointed Trustees of the Hampton County School Board as of January 1, 1982, three were black and three white. Two of these blacks were residents of District Number One and one a resident of District Number Two. The three whites were residents of District Number One.

29.

Upon the urging of black and white citizens of Hampton County, the Hampton County Legislative Delegation introduced and the South Carolina General Assembly enacted an Act to provide for the composition and selection of the Hampton County Board of Education to include six elected members and the County Superintendent of Education, *ex officio*. The Act provided for election of the six members in general elections beginning with the 1982 general election, for the six candidates receiving plurality of the

vote to be declared elected and allowed for single-shot voting. (Act R311) Exhibit 8.

30.

Following the enactment of the aforementioned legislation, a petition drive was initiated by white citizens of School District Number One seeking an advisory referendum of the ctizens of Hampton County on the question of whether or not to abolish the County Board of Education and the office of the County Superintendent of Education. This drive culminated in the submission to the Hampton County Council of a petition calling for a county-wide referendum on the aforementioned question. Thereafter, on February 24, 1982 the Hampton County Council in a split vote voted to conduct an advisory referendum. Upon information and belief, all or virtually all of the alleged 1,812 signatories on the petition which was submitted were residents of School District Number One. Additionally the vote was taken in the presence of an overflow crowd of approximately 200 persons in a special meeting location. Upon further information and belief, virtually all of the persons were white residents of School District Number One. Subsequently, because the authority of the County Council to conduct and to fund a referendum on the aforementioned question had been called into question, on March 6, 1982, the Council entered into an agreement with white South Carolina State Representative, Douglas E. McTeer whereby Representative McTeer would introduce a bill in the South Carolina General Assembly for enabling legislation to conduct a referendum concurrently with the efforts of the Council to pursue the procedures provided for by law for conducting such a referendum.

31.

Pursuant to legislation introduced by Representative McTeer which was passed by the South Carolina General

Assembly, the Governor of South Carolina, on April 9, 1982, signed an Act to abolish the Hampton County Board of Education on June 30, 1982, to abolish the Office of Hampton County Superintendent of Education on June 30, 1985, to devolve their respective duties upon the Trustees for Hampton County Districts Numbers One and Two; to provide for election rather than appointment of such Trustees; to make all the foregoing contingent upon a favorable vote of the electors of Hampton County at a referendum; and to provide for such a referendum in Hampton County in May, 1982 (Act R398). Exhibit 9. This legislation was enacted without apparent authority in state law and in contravention of existing statutes which provide for alteration or abolishment of school districts.

On May 25, 1982, a referendum was conducted by the Hampton County Election Commission and the voters approved a proposal to abolish the Hampton County Board of Education and the office of Hampton County Superintendent of Education with their respective duties to devolve upon the Trustees for Hampton County School Districts Numbers One and Two. The results of the referendum indicated that the vote was polarized along racial lines with white citizens voting in favor of the proposition and black citizens voting against it. Exhibit 9A. However, contrary to the mandate of Section 3 of Act 398, the results of the referendum were never certified to the South Carolina Code Commission, and upon information and belief, by reason thereof are null, void and of no effect. Exhibit 9B.

Nonetheless, Defendant Murdaugh and Representative McTeer publicly announced the opinion that the proposition to abolish the aforementioned entities as enacted earlier by the General Assembly had the effect of law, once approved by the voters, and would require no further action by the legislature.

The Defendant Election Commission thereafter confirmed preparations for opening the filing period for candidates for positions as Trustees of School Districts One and Two during the ensuing period of August 16-31, 1982, as provided for in Act R398.

On June 23, 1982, the Hampton County Board of Education adopted an Order of Consolidation consolidating Hampton County School Districts Number One and Number Two into a single county wide school district, pursuant to the provisions of *Section 59-17-50 of the Code of Laws of South Carolina, 1972, as amended.* Exhibits 10 and 11. This Order was duly processed according to procedures established by South Carolina law and now has the force of law. However, under pressure from white citizens of School District Number One who were displeased by the Board's action, the Board met in executive session on June 30, 1982, and adopted a document styled "Vote of Hampton County Board of Education to Rescind Order of Consolidation". Voting in favor of the purported action were four white members. Voting no or abstaining were the black Chairman of the Board and the white Superintendent of Education. The second black member of the Board was not present for the meeting. The announcement of the decision was made to a cheering crowd of more than 300 persons, virtually all from School District Number One, who were assembled in the main courtroom of the Hampton County Courthouse.

32.

South Carolina law provides no procedure for rescission of actions of County Boards of Education consolidating school districts within the County. The purported action of June 30, 1982, is therefore null, void and of no effect.

33.

On information and belief, the Defendant Election Commission opened the filing period for candidates to be elected

on August 16, 1982, ostensibly pursuant to the provisions of Section 1 (b) of Act R398. However, on information and belief, no legal notices of the impending filing period including dates, times and location were ever issued by the Defendant Election Commission. On further information and belief, the Election Commission began receiving filings on or about August 16, 1982, for candidates for the positions of Trustees of School Districts One and Two.

34.

Pursuant to an earlier submission to the United States Justice Department under provisions of Section 5 of the Voting Rights Act by the South Carolina Attorney General, the Assistant Attorney General of the Civil Rights Division, on August 23, 1982, informed the South Carolina official of the results of the Section 5 review which had been completed by the Justice Department of Act R398. It was determined that the change in method of selection of Trustees of School Districts One and Two from appointive to elective did not have either the purpose or effect of discriminating on the basis of race. With respect to the proposal to terminate the County Board of Education, the Attorney General indicated that he was unsatisfied that elimination of the County Board did not deprive Black voters of an opportunity to elect representatives of their choice who can help assure that interests of Blacks would be protected on a county-wide basis, and, thus, interposed an objection to the implementation of Act R398.

35.

The Defendant Election Commission, however, ignored the legal impact of the Justice Department objection and in contravention of provisions of the Voting Rights Act continued to accept filings for candidates for Trustees from School Districts One and Two under provisions of Act

R398 while at the same time, he commenced accepting filings for candidates for the Hampton County School Board pursuant to provisions of Act R311, all filings being received for candidacy in the November 2, 1982, General Election. Exhibit 14.

36.

In the November 2, 1982, General Election six members were elected to the Hampton County Board of Education, including the Plaintiffs Brooks, Gordon and Dixon. The other three members elected were white. Exhibits 15 and 16. However, only one black was elected to a four year term while two blacks were elected to two year terms.

37.

Although under provisions of Act R311, the terms of the newly elective Hampton Board of Education were scheduled to commence on January 1, 1983, the Plaintiffs have not been sworn into office and are not presently acting in the positions to which they were elected because of the wrongful acts of the Defendants in implementing Act R398.

38.

In the meantime, following the August 23, 1982, objection of the Justice Department to implementation of Act R398, certain of the Defendants and Representative Douglas McTeer prompted the South Carolina Attorney General to ask the U.S. Justice Department to reconsider its objection to Act R398. After considerable activity over a protracted period of time, including contacts and visits by several of the Defendants to the Justice Department, the Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice notified the Attorney General of South Carolina that the objection to Act R398 was being withdrawn. Exhibit 17. The withdrawal

was based upon the mistaken premise that the Hampton County Board of Education lacked authority to effect a consolidation of school districts within Hampton County. It was, therefore, concluded incorrectly that abolition of the Hampton County School Board will not prevent meaningful participation by blacks in school affairs.

39.

A spokesperson for the Justice Department was quoted as having said that he was "surprised by the Justice Department's action on its earlier decision", and that *"it was the first reversal he knew of by the department."* (Emphasis added) Exhibit 18.

40.

As a result of the Justice Department action, the proponents of abolishment of the Hampton County School Board "breathed a sigh of relief", the educational system of Hampton County was placed in disarray and black citizens of the County were by reason thereof disadvantaged because of the imminence of the contemplated change. Exhibit 19. Meanwhile, the Defendant Election Commission proceeded to prepare for an election pursuant to Act R398 and on January 12, 1983, caused to be published a Notice of Election, scheduling an election for the purpose of electing Trustees of Hampton County School Districts One and Two for March 15, 1983. Exhibits 20, 21, 22, and 23.

41.

On February 3, 1983, upon having been notified of the impending March 15, 1983 election for School Trustees for Hampton County, the Plaintiff Brooks together with one Adam Major and one Perkins Farmer, members of the class of black Plaintiffs, went to the office of the Defendant Election Commission and presented themselves to file for

vacancies on the two school districts created by Act R398. They were informed that by the Clerk of the Defendant Commission that the deadline for accepting filings of candidates for Trustee positions was August 31, 1982 and that she must refuse to accept their filings at that time. Brooks and Farmer intended to file as candidates for positions on the Hampton County School District Number Two Board of Trustees, while Major intended to file as a candidate for District Number One Trustee.

42.

Act R398 affects the governance of the school system within Hampton County and is a voting qualification or prerequisite to voting or standard, practice or procedure within the meaning of 42 U.S.C. Section 1973c.

43.

This change in voting has not been pre-cleared upon legally permissible grounds by submission to the Attorney General of the United States nor by the Federal Courts for the District of Columbia, and is, therefore, unenforceable.

44.

The Defendants have indicated their intentions of implementing Act R398.

45.

The decision to conduct an election for Trustees of Hampton County School Districts Number One and Two pursuant to the provisions of Act R398 without having first certified the results of the May 25, 1982, enabling referendum to the South Carolina Code Commission as mandated by the provisions of the said Act, is a voting qualification or prerequisite to voting, or standard, prac-

tice or procedure within the meaning of 42 U.S.C. Section 1973c.

46.

This change in voting has not been pre-cleared by submission to the Attorney General of the United States nor by the Federal Courts for the District of Columbia, and is, therefore, unenforceable.

47.

The decision to not allow filings of candidates for the positions of Trustees of Hampton County School Districts Number One and Number Two under Act R398 following the purported pre-clearance of Act 398 by the Attorney General of the United States on November 19, 1982, is a voting qualification or prerequisite to voting, or standard, practice or procedure within the meaning of 42 U.S.C. Section 1973c.

48.

This change in voting has not been pre-cleared by submission to the Attorney General of the United States nor by the Federal Courts for the District of Columbia, and is, therefore, unenforceable.

49.

Abolishment of the office of Hampton County Superintendent of Education, a position which is filled by a county-wide election, as provided for under Act R398, is a voting qualification or prerequisite to voting, or standard, practive or procedure within the meaning of 42 U.S.C. Section 1973c.

50.

This change in voting has not been pre-cleared by submission to the Attorney General of the United States nor by the Federal Courts of the District of Columbia, and is, therefore, unenforceable.

51.

Without having obtained the aforementioned pre-clearances, the Defendants have indicated their intentions of proceeding with an election for Trustees of Hampton County School Districts Number One and Number Two on March 15, 1983.

52.

Act R398 provides for a Hampton County school system which is governed by two separate school boards elected by vote of the electors within the respective districts and has the effect of abolishing the present county-wide elected Hampton County Superintendent of Education, thereby diluting and cancelling out the voting strength of the black electorate of Hampton County. The scheme provided for fragments and splits up black population concentrations, and combines black population concentrations with more populous white population concentrations, thereby diluting and cancelling out minority voting strength.

53.

The state of South Carolina and Hampton County have a long history of official purposeful discrimination against and disfranchisement of qualified black voters that has denied them the opportunity to register, to vote, and otherwise to participate in the Democratic process.

54.

Voting in Hampton County is and has been racially polarized in elections in which black candidates have run for office, with white voters generally voting for white candidates, and black voters voting for non-white candidates for elective office.

55.

Black citizens of Hampton County have long suffered from and continue to suffer from the results and effects of invidious discrimination and treatment in education, employment, income, health, living conditions, and other related areas.

56.

Political campaigns and referenda have been characterized by overt and subtle racial appeals.

57.

The implementation of Act R398 will deny to black voters the opportunity to elect candidates of their choice to elective office.

58.

The Hampton County Council has been and is unresponsive to the particular needs, interests, and concerns of the black community.

59.

By virtue of the foregoing, Act R398 has caused and is causing immediate and irreparable injury to Plaintiffs and members of the Plaintiff class by denying them an equal opportunity to participate in the political process and to elect candidates of their choice to public office. Plaintiffs

have no plain, speedy, or adequate remedy at law. Unless restrained and enjoined by this Court Defendants will continue to deny Plaintiffs and those similarly situated their rights.

IV. *Violations*

A. *First Cause of Action: Section 5 of the Voting Rights Act.*

60.

The actions of Defendants in failing to pre-clear the change of conducting an election for Trustees of Hampton County School Districts Number One and Number Two without having certified the results of the enabling referendum for such election to the South Carolina Code Commissioner, violates the rights of Plaintiffs guaranteed by 42 U.S.C. Section 1973c.

61.

The action of Defendants in failing to pre-clear the change of accepting filings for candidates for Trustees of Hampton County School Districts Number One and Number Two during the period between August 23 and August 31, 1982, pursuant to the provisions of Act R398, after said act became unenforceable, violates the rights of Plaintiffs guaranteed by 42 U.S.C. Section 1973c.

62.

The actions of Defendants in failing to pre-clear the change of conducting an election pursuant to provisions of Act R398, without having first sought authority for a filing period for candidates for the positions of Trustees of School Districts Number One and Number Two and without having accorded any opportunity whatsoever for filing of candidates for those positions once Act R398 became

ostensibly enforceable after November 18, 1982, violates the rights of Plaintiffs guaranteed by 42 U.S.C. Section 1973c.

63.

The actions of Defendants in failing to pre-clear the change of conducting an election for Trustees of Hampton County School Boards Number One and Number Two on a date after May, 1982, the period which was specified for the conduct of elections under provisions of Act R398, violates the rights of Plaintiffs guaranteed by 42 U.S.C. Section 1973c.

64.

The actions of Defendants in failing to pre-clear the change of abolishing the elective office of Hampton County Superintendent of Education and conferring the duties of that office to the Trustees of Hampton County School Boards Number One and Number Two, violates the rights of Plaintiffs guaranteed by 42 U.S.C. Section 1973c.

B. *Second Cause of Action: Section 2 of the Voting Rights Act.*

65.

By virtue of the foregoing, the implementation of Act R398 and the intentions to conduct an election on March 15, 1983, thereunder, has been imposed or applied by Defendants in a manner which results in a denial or abridgement of the right of Plaintiffs and those similarly situated to vote on account of race or color, and as a result, black citizens have less opportunity than whites to participate in the political process and to elect candidates of their choice, all in violation of the rights of Plaintiffs and those similarly situated secured by Section 2 of the Voting Rights

Act of 1965, as amended, Pub. L. No. 97-205, 96 STAT. 134 (1982).

C. *Third Cause of Action: Fourteenth and Fifteenth Amendments.*

66.

By virtue of the foregoing, the implementation of Act R398 had been adopted and maintained for the discriminatory purpose of diluting, minimizing, and cancelling out black voting strength in violation of the rights of Plaintiffs and those similarly situated secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983.

V. *Equitable Relief*

67.

There is a real and actual controversy between the parties. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief. Plaintiffs are suffering irreparable injury as a result of the acts of Defendants complained of herein and that injury will continue unless enjoined by this Court.

68.

The acts of Defendants described above are maintained under color of the State of South Carolina and under color of the Defendants' respective offices as officers and agents of the State, Hampton County, Hampton County Election Commission, Hampton County School District Number One and Hampton County School District Number Two.

WHEREFORE, premises considered, Plaintiffs respectfully pray that this Court set a speedy hearing of this matter, and:

(a) take jurisdiction of this matter;

(b) convene a district court of three judges pursuant to 42 U.S.C. Section 1973c;

(c) as a three judge court:

(1) enter a preliminary and permanent injunction forbidding the implementation of South Carolina Act R398, H3645 (1982) without pre-clearance of: (a) the change of conducting an election for Trustees without first certifying the results of the enabling referendum to the South Carolina Code Commissioner as required by the act, (b) the change of opening a filing period for candidates for Trustees under Act R398 during the period of August 23-31, 1982, when the said Act was enforceable, (c) the change of conducting an election as provided for by Act 398 without first providing for a filing period for candidates for the positions of Trustees, once the Act was ostensibly enforceable, and prior to the scheduled election, (d) the change of the date of the elections provided for in Act R398 from May, 1982, to a subsequent time without enabling legislation, and (e) the change of abolishing the elective Office of County Superintendent of Education and conferring the duties of that office upon the Trustees of Hampton County School Districts Number One and Number Two;

(2) declare the actions of the Defendants complained of to be in violation of Plaintiffs' rights under 42 U.S.C. Section 1973c;

(3) enter preliminary and permanent injunctions forbidding the conduct of elections for Trustees of Hampton County School Districts Number One

and Number Two under the provisions of Act R398, H3645; and

(4) grant such other and further relief as the Court may deem necessary and proper in the premises.

(d) as a single judge court:

(1) declare that the rights to due process of law of Plaintiffs Brooks, Gordon and Dixon, DeLoach and other Plaintiffs have been violated by the implementation of Act R398, H3645 (1982);

(2) declare that Act R398, H3645 (1982) unlawfully dilutes black voting strength and denies to Plaintiffs and those similarly situated their rights secured by Section 2 of the Voting Rights Act of 1965, as amended, and by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983;

(3) declare that Act 311 is of full effect and has the force of law and that the members of the Hampton County Board of Education elected thereunder shall be duly sworn to the offices to which they were elected on November 2, 1982;

(4) declare that the Hampton County Board of Education is the sole governing body of the Hampton County School System pursuant to its June 23, 1982, Order of Consolidation, which has been enacted according to the requirements of state law;

(5) declare that the Office of the Hampton County Superintendent of Education is provided by the laws of South Carolina and is the sole administrative entity for the Hampton County School System;

(6) grant preliminary and permanent injunctive relief restraining and enjoining the Defendants, their officers, agents, employees attorneys, and successors in office, and all persons in active concert and participation with them, from any further implementation or enforcement of, and from holding any elections under South Carolina Act R398, H3645 (1982);

(7) grant Plaintiffs their costs of court, necessary expenses of the litigation, and reasonable attorneys' fees as provided by 42 U.S.C. Section 1973 1(e) and 1988;

(8) grant Plaintiffs such other relief as may be just and equitable.

Respectfully submitted,

JOHN R. HARPER II, Attorney at Law, P.A.

By: /s/ JOHN R. HARPER II
John R. Harper II
3706 North Main Street
P.O. Box 843
Columbia, SC 29202
(803) 799-2798

THOMAS I. ATKINS, Esq.
MARGARET FORD, Esq.
186 Remsen Street
Brooklyn, NY 11201
(212) 858-0800

Columbia, South Carolina

March 10, 1983

Answer of Hampton County Election Commission, *et al.*

The Defendants, the Hampton County Election Commission, Randolph Murdaugh, III, individually and as Chairperson of the Hampton County Election Commission, Richard Sinclair, James Wooten and W. H. Smith, individually and as members of the Hampton County Election Commission, by way of answering the Complaint allege:

FOR A FIRST DEFENSE

That these Defendants allege that the Complaint shows on its face that the alleged federal questions are frivolous and unsubstantial.

FOR A SECOND DEFENSE

That these Defendants allege that the Complaint fails to state a claim against these Defendants upon which relief can be granted.

FOR A THIRD DEFENSE

That these Defendants, at all times relevant hereto, acted in good faith and within the scope of their official duties.

FOR A FOURTH DEFENSE

That these Defendants allege that during the performance or nonperformance of the acts alleged in the Complaint they did not perform any acts or fail to perform any acts corruptly, in bad faith or with a malicious motive.

FOR A FIFTH DEFENSE

1. That these Defendants deny any allegation of the Complaint not hereinafter either expressly admitted, qualified, or explained.

2. That paragraphs 1, 2, 3, and 10 of the Complaint consist of a characterization of the suit to which response is not necessary.

3. That these Defendants admit the allegations contained in paragraphs 15, 16, 17, 34, 36, 42, 44 and 49 of the Complaint.

4. That these Defendants admit upon information and belief the allegations contained in paragraphs 4, 5, 7, 8, 9, 12, 13, 14, 22, 23 and 39 of the Complaint.

5. That these Defendants allege that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 20, 24, 25, 26, 27, 28 and 30 of the Complaint, and, therefore, deny the same.

6. That these Defendants deny the allegations contained in paragraphs 43, 45, 46, 47, 48, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66 and 67 of the Complaint.

7. That these Defendants admit upon information and belief the allegations contained in paragraph 6 that Plaintiffs Brooks, Gordon, and Dixon were elected on November 2, 1982, to the Hampton County Board of Education, and deny the remaining allegations contained in paragraph 6.

8. That these Defendants admit the allegations contained in paragraph 11 of the Complaint, and by way of further answering would allege that the scheduled election was held on March 15, 1983, and that Plaintiff W. M. Hazel is also a member of the Hampton County Election Commission which is sued as a defendant.

9. That these Defendants admit so much of paragraph 18 of the Complaint as alleges that the Hampton County Election Commission, Hampton County School Districts Number One and Two and Hampton County, would come within the provisions of the Voting Rights Act and as to the remaining allegations would crave reference to 42

U.S.C. §1973 1(c)2 as to an accurate definition of the terms involved.

10. That these Defendants admit the allegations contained in paragraph 19 of the Complaint and by way of further answering would allege that these defendants would only have the power to submit a voting change effectuated by these defendants, any state-wide act or local ordinance would be submitted by the designated submitting authorities.

11. That these Defendants admit so much of paragraph 21 as alleges the official voter registration figures indicate black voters predominate in the area which comprises School District Number Two and lack sufficient information to form a belief as to the remaining allegations and, therefore, deny the same.

12. That these Defendants lack sufficient information to form a belief as to why R311 was introduced and, therefore, deny that allegation contained in paragraph 29 and admit the remaining allegations.

13. That these Defendants by way of answering paragraph 31 of the Complaint would admit the allegations setting out the provision of R398 of 1982 and would deny the remaining allegations contained in the first paragraph of 31; by way of answering the second paragraph of 31 these Defendants would admit that on May 25, 1983, a referendum was conducted by the Hampton County Election Commission which resulted in the voters approving a proposal to abolish the Hampton County Board of Education and the Office of Hampton County Superintendent of Education with their respective duties to devolve upon the Trustees for Hampton County School Districts Numbers One and Two and would deny the remaining allegations contained in the second paragraph of 31; by way of further answering these Defendants would allege that the

results were forwarded to the Code Commission on May 27, 1982; by way of answering the third paragraph of 31 these Defendants would deny that Randolph Murdaugh made the announcement alleged in this paragraph and would assert that they lack sufficient information to form a belief as to whether or not Representative McTeer made such a statement and, therefore, deny the same; these Defendants admit the allegation contained in paragraph four of 31; by way of answering paragraph five of 31 these Defendants would admit upon information and belief so much of this paragraph as alleges on June 23, 1983, the Hampton County Board of Education adopted an Order attempting to consolidate Hampton County School Districts One and Two into a single county-wide school district and that on June 30, 1982, they adopted a document styled "Vote of Hampton County Board of Education to Rescind Order of Consolidation," that they lack sufficient information as to the allegations regarding the circumstances regarding the vote taken and would, therefore, deny the same, and would deny the remaining allegations.

14. That these Defendants would admit so much of paragraph 32 as alleges there is no express procedure in South Carolina law for rescission of action of the County Board of Education to consolidate school districts within a county and would deny the remaining allegations contained in paragraph 32.

15. That these Defendants would admit the allegations contained in paragraph 33 that allege that under the provisions of R398 the County Election Commission opened filing for candidates on August 16, 1982, and also received filing for candidates for the positions of Trustees of School Districts One and Two and that no "legal notices" of filing were issued.

16. That these Defendants would admit so much of the allegations contained in paragraph 35 that allege the Elec-

tion Commission accepted filings for both the candidates for Trustees from School Districts One and Two under the provisions of R398 and for candidates for the Hampton County School Board pursuant to the provisions of R311 for an election to be held on November 2, 1982, and would deny the remaining allegations contained in paragraph 35.

17. That these Defendants would admit so much of paragraph 37 as alleges that the elected Hampton County Board of Education has not been sworn into office which was to commence January 1, 1983, and would deny the remaining allegations.

18. That these Defendants admit so much of paragraph 38 as alleges that the South Carolina Attorney General's Office requested the United States Department of Justice to reconsider its objection to R398 and that the objection was later withdrawn, further these Defendants crave reference to Plaintiffs' Exhibit 17 for the exact language of the letter from the Department of Justice, the remaining allegations are denied.

19. That these Defendants admit so much of paragraph 40 alleges that the Election Commission prepared for an election pursuant to R398 and had a Notice of the Election published, the remaining allegations are denied.

20. That these Defendants would admit upon information and belief so much of paragraph 41 as alleges that Plaintiffs Brooks, Adam Major and Perkins Farmer went to the Election Commission to file for vacancies on the two school district boards created by Act 398, that they admit that the Clerk of the Election Commission would have refused to accept filings after the date specified in R398, August 31, and would allege that they lack sufficient information to form a belief as to the remaining allegations and, therefore deny the same.

21. That these Defendants would admit so much of paragraph 51 as alleges that the election for the Hampton County School Districts One and Two was proceeded with and deny the remaining allegations.

22. That these Defendants admit so much of paragraph 52 as alleges R398 provides for a school system which is governed by two separate school boards elected by a vote of the electors within the respective districts and has the effect of abolishing the present county-wide elected Hampton County Superintendent of Education and deny the remaining allegations.

23. That these Defendants by way of answering paragraph 68 would admit that all of these Defendants' actions were maintained under color of State law and their Office.

WHEREFORE, having answered the Complaint herein, these Defendants demand that it be dismissed with cost and pray that the Court grant them attorney fees and such other relief as the Court may deem just and proper.

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant Attorney General

EMORY SMITH
Assistant Attorney General

By: /s/ TREVA ASHWORTH
Attorneys for Defendants, Hampton County Election Commission, Randolph Murdaugh, III, Richard Sinclair, James Wooten, W. H. Smith

Columbia, South Carolina

April 20, 1983.

Answer of Defendants Hampton County School District Number One and Phillip Stanley, Lenon Brooker, Rebecca Badger, Wiley Kessler and Gerald Ulmer, Trustees of Hampton County School District No. 1

The defendants Hampton County School District No. 1 ("District 1") and Phillip Stanley, Lenon Brooker, Rebecca Badger, Wiley Kessler and Gerald Ulmer, Members of the Board of Trustees of District 1 ("Trustees of District 1"), for their answer to the complaint, respectfully allege that:

FOR A FIRST DEFENSE

1. All allegations of the complaint not hereinafter expressly admitted are denied.

2. The allegations of paragraphs 1, 2 and 3 constitute a characterization of the action as to which response is unnecessary.

3. As to the allegations of paragraph 4, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

4. The allegations of paragraph 5 are admitted on information and belief.

5. The allegations of paragraph 6 are denied except that these defendants admit that the plaintiffs Brooks, Gordon and Dixon were elected as members of the Hampton County Board of Education on November 2, 1982.

6. The allegations of paragraph 7 are admitted on information and belief.

7. As to the allegations of paragraphs 8 and 9, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

8. The allegations of paragraph 10 constitute a characterization of the action as to which response is unnecessary.

9. The allegations of paragraph 11 are admitted on information and belief.

10. The allegations of paragraph 12 are admitted as of the time of the filing of this action; however, the current Trustees of Dstrict 1, who were duly elected on March 15, 1983, have qualified and are acting, are Phillip Stanley, Lenon Brooker, Jerlyn Hutto, Miles Freemen and Gerald Ulmer.

11. The allegations of paragraph 13 are admitted as of the time of the filing of this action.

12. As to the allegations of paragraph 14, these defendants admit that the defendants Cohen, Wood, Hopkins, Crews and Bowers are members of the defendant Hampton County Council and, as to the remaining allegations, they crave reference to Sections 4-9-10 *et seq.*, Code of Laws of South Carolina, 1976, amended, for an accurate statement as to the jurisdiction of the defendant Hampton County Council over school matters.

13. The allegations of paragraph 15 are admitted on information and belief.

14. The allegations of paragraphs 16 and 17 are admitted.

15. As to the allegations of paragraph 18, these defendants admit them as to the defendants Hampton County School Districts Numbers 1 and 2 and Hampton County with respect to local ordinances, orders, resolutions or other

local actions, but deny them as to the defendant Hampton County Election Commission.

16. As to the allegations of paragraph 19, these defendants admit that they have the authority and duty to comply with the applicable requirements, if any, of Section 5 of the Voting Rights Act of 1965.

17. As to the allegations of paragraphs 20 and 21, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

18. The allegations of paragraphs 22 and 23 are admitted on information and belief.

19. As to the allegations of paragraph 24, these defendants allege that for the 1982-83 school year there are enrolled in District 1 1454 black students and 1214 white students and, as to the remaining allegations, they allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

20. As to the allegations of paragraph 25, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

21. As to the allegations of paragraph 26 relating to the South Carolina Department of Education document, these defendants crave reference to Exhibit 7 attached to the complaint for an accurate statement of its contents and, as to the remaining allegations, they allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

22. The allegations of paragraph 27 are denied.

23. As to the allegations of paragraph 28, these defendants admit that as of January 1, 1982, there were three black and three white members of the appointed Hampton County Board of Education; and, as to the remaining allegations, they are without knowledge or information sufficient to form a belief as to the truth thereof.

24. As to the allegations of paragraph 29, these defendants admit that the South Carolina General Assembly enacted legislation in February, 1982, providing for an elected Hampton County Board of Education, a copy of which is attached to the complaint as Exhibit 8; they further allege that that legislation was subsequently repealed by implication by the enactment of Act No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9.

25. As to the allegations of paragraph 30, these defendants admit that a petition signed by black and white citizens from throughout Hampton County seeking an advisory referendum on the question of whether or not the offices of the Hampton County Board of Education and the Hampton County Superintendent of Education should be abolished was presented to the defendant Hampton County Council; that the defendant Hampton County Council took action to conduct the advisory referendum while, at the same time, enabling legislation calling for a similar referendum was enacted by the South Carolina General Assembly as Act No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9; and the remaining allegations of paragraph 30 are denied.

26. As to the allegations of paragraph 31, these defendants crave reference to Act No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9, for an accurate statement as to its contents; further, these defendants admit that a referendum was conducted on May

25, 1982, and the voters of Hampton County approved the abolishment of the Hampton County Board of Education and the Hampton County Superintendent of Education and the transfer of their respective duties to the boards of trustees of Hampton County School Districts 1 and 2; further, these defendants admit that the defendant Hampton County Election Commission proceeded with the implementation of Act No. 549 of 1982 by announcing the filing period for candidates for the two boards of trustees as August 16—31, 1982, as provided by that Act; further, these defendants admit that on June 23, 1982, the Hampton County Board of Education purported to consolidate the two defendant Hampton County School Districts by order, which order was subsequently rescinded, copies of which orders are attached to the complaint as Exhibits 10 and 12 respectively; and the remaining allegations of paragraph 31 are denied.

27. As to the allegations of paragraph 32, these defendants admit that there is no express statutory method by which to rescind a valid order of consolidation under South Carolina law and the remaining allegations of paragraph 32 are denied.

28. As to the allegations of paragraph 33, these defendants admit that the defendant Hampton County Election Commission opened the filing period for candidates for the two boards of trustees on August 16, 1982, and, as to the remaining allegations, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

29. As to the allegations of paragraph 34, these defendants crave reference to the August 23, 1983, letter from the United States Department of Justice, a copy of which

is attached to the complaint as Exhibit 13, for an accurate statement as to its contents.

30. As to the allegations of paragraph 35, these defendants admit that the defendant Hampton County Election Commission accepted filings for candidates for the two boards of trustees and, as to the remaining allegations, they allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

31. The allegations of paragraph 36 are admitted with the explanation that the terms of office of the successful candidates are determined by the provisions of Act No. 547 of 1982, a copy of which is attached to the complaint as Exhibit 8.

32. As to the allegations of paragraph 37, these defendants admit that the plaintiff members of the Hampton County Board of Education elected in the November 2, 1982, general election have not been sworn into office and are not presently acting in those positions; and the remaining allegations are denied.

33. As to the allegations of paragraph 38, these defendants admit that the United States Department of Justice was requested by the South Carolina Attorney General's Office to reconsider its objection to Act No. 549 of 1982 and that the objection was withdrawn on November 19, 1982; further, these defendants crave reference to the November 19, 1982, letter, a copy of which is attached to the complaint as Exhibit 17, for an accurate statement as to its contents; and the remaining allegations are denied.

34. As to the allegations of paragraph 39, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

35. The allegations of paragraph 40 are denied except that these defendants admit that the defendant Hampton County Election Committee published a notice of election scheduling the elections for the two boards of trustees for March 15, 1983.

36. As to the allegations of paragraph 41, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

37. The allegations of paragraph 42 are admitted.

38. The allegations of paragraph 43 are denied.

39. As to the allegations of paragraph 44, these defendants admit that Act R398 (No. 549) is being implemented.

40. The allegations of paragraphs 45, 46, 47 and 48 are denied.

41. The allegations of paragraph 49 are admitted.

42. The allegations of paragraph 50 are denied.

43. The allegations of paragraph 51 are denied except that the March 15, 1983, election of members of the two boards of trustees was held.

44. As to the allegations of paragraph 52, these defendants crave reference to Act No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9, for an accurate statement as to its contents and deny the remaining allegations.

45. The allegations of paragraph 53 through 67 inclusive are denied.

Answer of Hampton County School District Number One, et al.

46. As to the allegations of paragraph 68, these defendants admit that their actions with respect to the plaintiffs have been taken under color of law of the State of South Carolina and under their offices as members of the board of trustees of Hampton County School District No. 1, but deny that those actions have violated the plaintiffs' rights or are otherwise unconstitutional.

FOR A SECOND DEFENSE

47. As public officers, the defendant Trustees of District 1 acted at all times relevant within the scope of their duties under the Constitution and laws of the State of South Carolina, acted within the range of discretion permitted holders of those offices under South Carolina law and acted with a reasonable good faith belief that their actions with respect to the plaintiffs were constitutional and valid.

WHEREFORE, having answered the complaint herein, the defendants District 1 and Trustees of District 1 demand that it be dismissed with costs and pray that the Court grant them attorney's fees and such other and further relief as to the Court may seem proper and just.

SINKLER GIBBS & SIMONS
Post Office Box 11458
Columbia, South Carolina 29211

/s/ KAREN LE CRAFT HENDERSON
Attorneys for the defendants
District 1 and Trustees of
District 1

April 20, 1983

Columbia, South Carolina

Amended Answer of Defendants Hampton County School District Number Two and T.M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon, and Lee Manigo, Trustees of Hampton County School District No. 2

The defendants Hampton County School District No. 2 ("District") and T. M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon and Lee Manigo, Members of the Board of Trustees of District 2 ("Trustees of District 2"), for their amended answer to the complaint, respectfully allege that:

FOR A FIRST DEFENSE

1. All allegations of the complaint not hereinafter expressly admitted are denied.

2. The allegations of paragraphs 1, 2 and 3 constitute a characterization of the action as to which response is unnecessary.

3. As to the allegations of paragraph 4, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

4. The allegations of paragraph 5 are admitted.

5. As to the allegations of paragraph 6, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the claim that Plaintiff Brooks and erstwhile plaintiffs Gordon and Dixon were *duly* elected as members of the Hampton County Board of Education on November 2, 1982; but these defendants admit that the plaintiff Brooks and the previous plaintiffs Gordon and Dixon were elected as members of the Hampton County Board of Education on November 2, 1982.

Amended Answer of Hampton County School District Number Two

6. The allegations of paragraph 7, 8, and 9 are admitted on information and belief.

7. The allegations of paragraph 10 constitutes a characterization of the action as to which response is unnecessary.

8. The allegations of paragraph 11 are admitted on information and belief.

9. The allegations of paragraph 12 are admitted as of the time of the filing of this action.

10. The allegations of paragraph 13 are admitted as of the time of this action; however, the current Trustees of District Two, who were duly elected on March 15, 1983, have qualified and are acting, are T. M. Dixon, Willie J. Orr, Virgix Johnson, Jr., Rufus Gordon and Lee Manigo.

11. As to the allegations of paragraph 14, these defendants admit that the defendants Cohen, Wood Hopkins, Crews and Bowers are members of the defendant Hampton County Council and to the remaining allegations, they crave reference to Sections 4-9-10 *et seq.*, Code of Laws of South Carolina, 1976, as amended, for an accurate statement as to the jurisdiction of the defendant Hampton County Council over school matters.

12. The allegations of paragraph 15 are admitted on information and belief.

13. The allegations of paragraph 16 and 17 are admitted.

14. As to the allegations of paragraph 18, these defendants admit them as to the defendants Hampton County School Districts Numbers 1 and 2 and Hampton County

Amended Answer of Hampton County School District Number Two

with respect to local ordinances, orders, resolutions or other actions. These defendants are without knowledge or information sufficient to form a belief as to the applicability of the Act to the defendant Hampton County Election Commission.

15. As to the allegations of paragraph 19, these defendants admit that they have the authority and duty to comply with the applicable requirements, if any, of Section 5 of the Voting Rights Act of 1965.

16. As to the allegations of paragraph 20 and 21, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

17. The allegations of paragraphs 22 and 23 are admitted on information and belief.

18. As to the allegations of paragraph 24, these defendants allege that for the 1982-83 school year are enrolled in District Two *1436* black students and *120* white students and, as to the remaining allegations, they allege they are without knowledge or information sufficient to form a belief as to the truth thereof.

19. As to the allegations of paragraph 25, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

20. As to the allegations of paragraph 26, relating to the South Carolina Department of Education document, these defendants crave reference to Exhibit 7 attached to the complaint for an accurate statement of its contents and, as to the remaining allegations, they allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

Amended Answer of Hampton County School District Number Two

21. As to the allegations of paragraph 27, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

22. As to the allegations of paragraph 28, these defendants admit that as of January 1, 1982, there were three black and three white members of the appointed Hampton County Board of Education; and, as to the remaining allegations, they are without knowledge or information sufficient to form a belief as to the truth thereof.

23. As to the allegations of paragraph 29, these defendants admit that the South Carolina General Assembly enacted legislation in February, 1982, providing for an elected Hampton County Board of Education, a copy of which is attached to the complaint as Exhibit 8; they further allege that the legislation was subsequently repealed by implication by the enactment of No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9.

24. As to the allegations of paragraph 30, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

25. As to the allegations of paragraph 31, these defendants crave reference to Act No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9, for an accurate statement as to its contents; further, these defendants admit that a referendum was conducted on May 25, 1982, and the voters of Hampton County approved the abolishment of the Hampton County Board of Education and the Hampton County Superintendent of Education and the transfer of their respective duties to the boards of trustees of Hampton County School Districts 1 and 2; further, these defendants admit that on June 23, 1982, the

Amended Answer of Hampton County School District Number Two

Hampton County Board of Education purported to consolidate the two defendant Hampton County School Districts by order; further, these defendants admit that on June 30, 1982, the Hampton County Board of Education purported to rescind the order of consolidation, copies of which orders are attached to the complaint as Exhibits 10 and 12 respectively; and these defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 31.

26. As to the allegations of paragraph 32, these defendants admit that there is not express statutory method by which to rescind a valid order of consolidation under South Carolina law and the remaining allegations of paragraph 32 are denied.

27. As to the allegations of paragraph 33, these defendants admit that the defendant Hampton County Election Commission opened the filing period for candidates for the two boards of trustees on August 16, 1982, and, as to the remaining allegations, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

28. As to the allegations of paragraph 35, these defendants crave reference to the August 23, 1983, letter from the United States Department of Justice, a copy of which is attached to the complaint as Exhibit 13, for an accurate statement as to its contents.

29. As to the allegations of paragraph 35, these defendants admit that the defendant Hampton County Election Commission accepted filings for candidates for the two boards of trustees and, as to the remaining allegations, they allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

Amended Answer of Hampton County School District Number Two

30. The allegations of paragraph 36 are admitted with the explanation that the terms of office of the successful candidates are determined by the provisions of Act No. 547 of 1982, a copy of which is attached to the complaint as Exhibit 8.

31. As to the allegations of paragraph 37, these defendants admit that the plaintiff members of the Hampton County Board of Education elected in the November 2, 1982, general election have not been sworn into office and are not presently in those positions; and these defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations thereof.

32. As to the allegations of paragraph 38, these defendants admit that the United States Department of Justice was requested by the South Carolina Attorney General's Office to reconsider its objection to Act No. 529 of 1982 and that the objection was withdrawn on November 19, 1982; further, these defendants crave reference to the November 19, 1982, letter, a copy of which is attached to the complaint as Exhibit 17, for an accurate statement as to its contents; and the remaining allegations are denied.

33. As to the allegations of paragraph 39, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

34. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 except that these defendants admit that the defendant Hampton County Election Committee published a notice of election scheduling the elections for the two boards of trustees for March 15, 1983.

Amended Answer of Hampton County School District Number Two

35. As to the allegations of paragraph 41, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

36. The allegations of paragraph 42 are admitted.

37. The allegations of paragraph 43 are denied.

38. As to the allegations of paragraph 44, these defendants admit that Act R398 (No. 549) is being implemented.

39. The allegations of paragraphs 45, 46, 47 and 48 are denied.

40. The allegations of paragra[illegible]49 are admitted.

41. The allegations of paragraph 50 are denied.

42. The allegations of paragraph 51 are denied except that the March 15, 1983, election of members of the two boards of trustees was held.

43. As to the allegations of paragraph 52, these defendants crave reference to Act No. 549 of 1982, a copy of which is attached to the complaint as Exhibit 9, for an accurate statement as to its contents and deny the remaining allegations.

44. These defendants admit a history of discrimination of the kind alleged in paragraph 53; but deny the existence of any such discrimination with respect to any election or legislative activities pertinent to Civil Action No. 83-612-6.

45. As to the allegations of paragraph 54, these defendants are without knowledge or information sufficient to form a belief about the truth thereof.

Amended Answer of Hampton County School District Number Two

46. These defendants admit the history of discrimination of the kind alleged in paragraph 55 but deny that the existence of such alleged discrimination contributed to the political, legislative or election activities associated with this law suit.

47. These defendants admit that in the past, political campaigns and referenda in Hampton County have been characterized by overt and subtle racial appeals but deny that the political campaigns and referendum associated with this suit were so characterized.

48. The allegations of paragraphs 57 and 67 inclusive are denied.

49. As to the allegations of paragraph 68, these defendants admit that their actions with respect to the plaintiffs have been taken under color of law of the State of South Carolina and under their offices as members of the board of trustees of Hampton County School District No. 1, but deny that those actions have violated the plaintiffs' rights or are otherwise unconstitutional.

FOR A SECOND DEFENSE

50. As public officers, the defendant Trustees of District 2 acted at all times relevant within the scope of their duties under the Constitution and laws of the State of South Carolina, acted within the range of discretion permitted holders of those offices under South Carolina law and acted with a reasonable good faith belief that their actions with respect to the plaintiffs were constitutional and valid.

WHEREFORE, having answered the complaint herein, the defendants District 1 and Trustees of District 1 demand

Amended Answer of Hampton County School District Number Two

that it be dismissed with costs and pray that the Court grant them attorney's fees and such other and further relief as to the Court may seem proper and just.

/s/ BRUCE E. DAVIS
Bruce E. Davis
P. O. Box 881
Camden, South Carolina 29020

McNAIR GLENN KONDUROS CORLEY
SINGLETARY PORTER DIBBLE, P.A.
P. O. Box 11390
Columbia, South Carolina 29211

/s/ M. ELIZABETH CRUM
M. Elizabeth Crum
Jane W. Trinkley

September 29, 1983

Camden, South Carolina

Letter of Gerald W. Jones to C. Havird Jones, Jr., April 27, 1982

U.S. Department of Justice

[EMBLEM]

Washington, D.C. 20530

WBR:CWG:DEK:gml
DJ 166-012-3
E3227

April 27, 1982

C. Havird Jones, Jr., Esq.
Assistant Attorney General
Wade Hampton Office Building
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Jones:

This is in reference to Act No. R269 (1981), which provides for the reapportionment of the county council of Greenville County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was completed on March 25, 1982. In accordance with your request expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional in-

Letter of Gerald W. Jones to C. Havird Jones, Jr., April 27, 1982

formation that would otherwise require an objection comes to his attention during the remainder of the sixty-day period.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

/s/ GERALD W. JONES
Gerald W. Jones
Chief, Voting Section

Letter of Gerald W. Jones to C. Havird Jones, Jr., April 28, 1982

U.S. Department of Justice

[EMBLEM]

Washington, D.C. 20530

WBR:CWG:KQ:gml
DJ 166-012-3
E5549

April 28, 1982

C. Havird Jones, Jr., Esq.
Assistant Attorney General
Wade Hampton Office Building
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Jones:

This is in reference to Act No. R311 (1982), which provides for the election of the board of education in Hampton County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on February 27, 1982.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

/s/ Illegible
for Gerald W. Jones
Chief, Voting Section

Letter of Gerald W. Jones to C. Havird Jones, Jr., June 2, 1982

U.S. Department of Justice

[EMBLEM]

Washington, D.C. 20530

WBR:CWG:JGH:gml
DJ 166-012-3
E7254

June 2, 1982

C. Havird Jones, Jr., Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Jones:

This is in reference to Act No. R413 (1982), which establishes the filing period for candidates seeking nomination to any district within certain counties in the State of South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on April 27, 1982. In accordance with your request expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional in-

Letter of Gerald W. Jones to C. Havird Jones, Jr., June 2, 1982

formation that would otherwise require an objection comes to his attention during the remainder of the sixty-day period.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

/s/ Illegible
for Gerald W. Jones
Chief, Voting Section

Act No. R 413 (1982)

A JOINT RESOLUTION

To Delay for 1982 Only the Filing Period from Noon, March 16th, to Noon, March 30th, Until Noon, April 23rd, to Noon, May 7th, for Candidates Seeking Nomination to Any District Within a County Which Has Been or Is Being Reapportioned and as of March 1, 1982. Has Not Received Preclearance Pursuant to the Provisions of Section 5 of the 1965 Voting Rights Act.

Whereas, the General Assembly, by a 1982 act bearing ratification number 366, delayed the filing period for certain offices within a county to allow adequate time for the adoption of new redistricting plans and proper notice to all candidates of the new district lines; and

Whereas, the General Assembly now finds that a substantial number of the counties have completed their redistricting plans and are ready to proceed with the election process. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. A. Notwithstanding any other provision of law, the provisions of this Joint Resolution shall be applicable during the calendar year 1982 only.

B. The filing period for candidates seeking nomination to any district within a county which has been or is being reapportioned and as of March 1, 1982, has not received preclearance pursuant to the provisions of Section 5 of the 1965 Voting Rights Act (42 USCA Sections 1973 et seq.) shall begin at noon on April 23, 1982, and shall close at noon on May 7, 1982.

C. The filing period for the nomination of candidates for all the offices in a party primary shall be held as provided for by law.

Section 2. This act shall take effect upon approval by the Governor.

Letter of Gerald W. Jones to C. Havird Jones, Jr., June 4, 1982

U.S. Department of Justice

[EMBLEM]

Washington, D.C. 20530

WBR:CWG:ELG:gml
DJ 166-012-3
E7064

June 4, 1982

C. Havird Jones, Jr., Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Jones:

This is in reference to Act No. R362 (1982), which provides for the redistricting of councilmanic districts in Cherokee County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on April 5, 1982.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

/s/ GERALD W. JONES
Gerald W. Jones
Chief, Voting Section

Letter of Gerald W. Jones to Marion S. Riggs, June 22, 1982

U.S. Department of Justice

[EMBLEM]

Washington, D.C. 20530

WBR:CWG:RMW:rnh
DJ 166-012-3
E7946

June 22, 1982

Marion S. Riggs, Esq.
Rogers, Riggs and Rogers
P. O. Box 487
Manning, South Carolina 29102

Dear Ms. Riggs:

This is in reference to Ordinance No. 3 (1982), which reapportions Clarendon County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on April 23, 1982. Although we noted your request for expedited consideration, we have been unable to respond until this time.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

/s/ Illegible
for Gerald W. Jones
Chief, Voting Section

Letter of William Bradford Reynolds to C. Havird Jones, Jr., August 23, 1982

U.S. Department of Justice
Civil Rights Division

[EMBLEM]

Office of the Assistant Attorney General

Washington, D.C. 20530

August 23, 1982

C. Havird Jones, Jr., Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Jones:

This is in reference to Act No. R398 (1982), which abolishes the county board of education and superintendent of education and changes the method of selecting the members of the boards of education for Districts 1 and 2 from appointive to elective in Hampton County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on June 22, 1982. Although we noted your request for expedited consideration, we have been unable to respond until this time.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.38). In reaching our determination in this matter, we have considered carefully all of the information provided with your submission as well as information from other interested parties.

Letter of William Bradford Reynolds to C. Havird Jones, Jr., August 23, 1982

Hampton County has a population that is 52 percent black. The county board of education, until now appointed, will be elected beginning in November of this year, a change precleared by this office on April 28, 1982. Under the current proposal, the boards of education for Districts 1 and 2 are also to be elected (rather than appointed) in the future. Based on the information submitted by the State, we are persuaded that this change in the District 1 and 2 Boards does not have either the purpose or effect of discriminating on the basis of race.

We cannot reach a like conclusion, however, with respect to the proposal to terminate the county board. Our analysis shows that the county board has been particularly responsive to the interests and needs of the black community in Hampton County and consistently has appointed bi-racial representation on the local boards of trustees for both School District 1 and School District 2. We remain unsatisfied on the information submitted by the State that elimination of the county board—in a county with a 52-percent black population and a system which allows the use of a plurality and single-shot method of election—does not deprive black voters of an opportunity to elect representatives of their choice who can help assure that interests of blacks will be protected on a county-wide basis.

Under these circumstances, I cannot conclude, as I must under the Voting Rights Act, that the burden of showing that these changes will not be discriminatory toward blacks has been sustained. Therefore, on behalf of the Attorney General, I must object to Act No. R398 (1982).

Of course, as provided by Section 5 of the Voting Rights Act you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor will have the effect of denying or abridging the right to vote

Letter of William Bradford Reynolds to C. Havird Jones, Jr., August 23, 1982

on account of race, color or membership in a language minority group. In addition, the procedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make Act No. R398 legally unenforceable. See also 28 C.F.R. 51.9.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of South Carolina plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-8388), Director of the Section 5 Unit of the Voting Section.

Sincerely,

/s/ Wm. Bradford Reynolds
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

RECEIVED
S. C. ATTORNEY GENERAL
DATE 8-26-82

Letter of C. Havird Jones, Jr. to Representative Douglas E. McTeer, Jr., August 26, 1982

THE STATE OF SOUTH CAROLINA

[Emblem]

Office of the Attorney General
Civil Division
Rembert C Dennis Building
Post Office Box 11549
Columbia, S.C. 29211
Telephone 803-758-2072

Daniel R. McLeod
Attorney General

August 26, 1982

Representative Douglas E. McTeer, Jr.
Post Office Box 97
Early Branch, South Carolina 29916

Re: Act R398—Hampton County Board of Education

Dear Representative McTeer:

Enclosed is a copy of the letter from the Justice Department wherein they disapproved the abolishment of the Hampton County Board of Education.

After you have had an opportunity to read this letter, please let me know if you are interested in gathering supportive data to request reconsideration of their decision. A letter to Justice giving notice of this intention would need to be sent promptly.

Letter of C. Havird Jones, Jr. to Representative Douglas E. McTeer, Jr., August 26, 1982

I shall await your advice in this regard.

Sincerely,

/s/ C. Havird Jones, Jr.
C. Havird Jones, Jr.
Assistant Attorney General

CHJjr:prl

cc: J. Emory Smith, Esquire
Randall T. Bell, Esquire
John P. Linton, Esquire
William C. Anderson, Jr., Esquire
Mr. John W. Dodge
Ms. Marcia Wood

Letter of C. Havird Jones, Jr. to William Bradford Reynolds, August 31, 1982

THE STATE OF SOUTH CAROLINA

[Emblem]

Office of the Attorney General
Civil Division
Rembert C Dennis Building
Post Office Box 11549
Columbia, S.C. 29211
Telephone 803-758-2072

Daniel R. McLeod
Attorney General

August 31, 1982

HAND DELIVERED

Mr. William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
Washington, D.C. 20530

Re: Act R398—Hampton County Board of Education

Dear Mr. Reynolds:

Pursuant to a request by Representative Doug McTeer, we are officially requesting reconsideration of the above-cited submission.

This submission was received by you on June 22, 1982, and was objected to by means of a letter dated August 23, 1982.

Letter of C. Havird Jones, Jr. to William Bradford Reynolds, August 31, 1982

Representative McTeer will provide additional information per his scheduled visit with your office on September 1, 1982.

Sincerely,

/s/ C. Havird Jones, Jr.
C. Havird Jones, Jr.
Assistant Attorney General

CHJjr:prl

cc: J. Emory Smith, Esquire
Randall T. Bell, Esquire
John P. Linton, Esquire
William C. Anderson, Jr., Esquire
Mr. John W. Dodge
Ms. Marcia Wood
Rep. Doug McTeer

Letter of William Bradford Reynolds to C. Havird Jones, Jr., November 19, 1982

U.S. Department of Justice

[Emblem]

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

19 NOV 1982

C. Havird Jones, Jr., Esq.
Assistant Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 19111

Dear Mr. Jones:

This is in reference to your request that the Attorney General reconsider his August 23, 1982, objection under Section 5 of the Voting Rights Act of 1965, as amended, to Act No. R398 (1982), which abolishes the county board of education and superintendent of education and changes the method of selecting members of the boards of education for Districts 1 and 2 from appointive to elective in Hampton County, South Carolina. Your letter was hand delivered on September 1, 1982, along with information provided by Representative McTeer during a conference with departmental staff on that date. Information necessary for our reconsideration of the objection was also provided by Attorney John P. Linton on September 15, 1982.

We have reviewed carefully the information that you have provided to us, as well as comments and information coming to our attention from other sources. As a result of this analysis, we find that the concerns we initially had and which formed the basis for the August 23 objection to the abolishment of the county board have now been allayed.

Letter of William Bradford Reynolds to C. Havird Jones, Jr., November 19, 1982

Our major concern related to the apparent interest in portions of the black community to attempt to consolidate the two school districts and the effect of elimination of the county board as the authorizing body of any potential consolidation. A reappraisal of South Carolina law, however, establishes that the county board lacks authority to effect a consolidation and its abolition, therefore, will not have the potentially discriminatory impact we had initially perceived. In addition, although the county board had a fruitful relationship with the black community, its abolition will not prevent meaningful participation in school affairs. More recent information shows that black residents in both districts are well represented at all levels of administration and operation.

Accordingly, pursuant to the reconsideration guidelines promulgated in the Procedures for the Administration of Section 5 (28 C.F.R. 51.47), the objection interposed to the changes affecting voting contained in Act No. R398 (1982) is hereby withdrawn. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See also 28 C.F.R. 51.48.

Sincerely,

/s/ Wm. Bradford Reynolds
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: John P. Linton, Esq.
Sinkler, Gibbs & Simons

RECEIVED
S. C. ATTORNEY GENERAL
DATE 11-23-82

Letter of Treva G. Ashworth to Randolph Murdaugh, III, January 4, 1983

THE STATE OF SOUTH CAROLINA

[Emblem]

Office of the Attorney General
Civil Division
Rembert C Dennis Building
Post Office Box 11549
Columbia, S.C. 29211
Telephone 803-758-2072

Daniel R. McLeod
Attorney General

January 4, 1983

Randolph Murdaugh, III
Peters, Murdaugh, Parker,
Eltzroth & Detrick
Post Office Box 457
Hampton, South Carolina 29924

Dear Mr. Murdaugh:

Your request for an opinion has today been referred to me for reply. You have raised various questions regarding the Acts bearing ratification numbers R-311 and R-398.

The Act bearing ratification number 311 was enacted on February 18, 1982, and provided for the composition and method of election of the Hampton County Board of Education. On April 9, 1982, R-398 was enacted. This Act submitted to the electorate a referendum on if the Hampton County Board of Education and the Office of the Hampton County Superintendent of Education should be abolished and their power devolved upon the trustees for

Letter of Treva G. Ashworth to
Randolph Murdaugh, III, January 4, 1983

Hampton County School Districts Nos. 1 and 2 and whether the trustees for Hampton County School Districts Nos. 1 and 2 should be elected. The referendum was approved by the electorate and on November 19, 1982, the United States Justice Department withdrew their previous objection to the Act. The Act provides that if the referendum results are favorable, the provisions of the Act will be implemented.

You have asked the following questions:

1. Should an election be held to elect trustees for the Hampton County School Districts Nos. 1 and 2?

Yes. On November 23, 1982, Emory Smith of this Office issued an opinion that the proposed consolidation of the two District Boards by the County Board of Education was of no effect LINE MISSING ! ! copy enclosed). Therefore, the provisions of R-398 are now in effect and it requires that an election be held for the school trustees.

2. When should such an election be held?

As soon as possible.

3. Should the filing for the respective district boards be reopened?

I assume that pursuant to the Act's provisions, it was anticipated that the election for the school trustees for Districts Nos. 1 and 2 would be conducted in the general election and that notice was given of the filing period and candidates did file within the time period specified by stat-

Letter of Treva G. Ashworth to
Randolph Murdaugh, III, January 4, 1983

ute. Assuming this to be the case, there is no reason to reopen filing as only the date of the election has changed.

Sincerely,

/s/ TREVA G. ASHWORTH
Treva G. Ashworth
Senior Assistant Attorney General

TGA:st
Enclosure

REVIEWED AND APPROVED:

/s/ VICTOR S. EVANS
Victor S. Evans
Deputy Attorney General

cc: C. Havird Jones, Esquire
Emory Smith, Esquire

Affidavit of John W. Dodge, July 13, 1983

PERSONALLY APPEARED BEFORE ME THE BELOW SIGNED, John W. Dodge, who, on oath, deposes and says he is the elected County Superintendent of Education for Hampton County, South Carolina:

1. After having served fifteen years in elementary and high school principalships he was first elected to the office in the General Election, November 1972 and took office July 1, 1973. He has twice been re-elected; the current four year term having begun July 1, 1981.

2. Acting under policy guidance of Hampton County Board of Education he has administered the functions of the Hampton County school system since 1973. He holds a valid superintendent's credential from the South Carolina State Board of Education.

3. Prior to July 1, 1982, Hampton County Office of Education answered to the appointed County Board of Education and served as the central administrative office for the schools of Hampton County. All functions were handled as required in state law including that of administrative officer for the Hampton County Board of Education.

4. He also deposes and says that there were no indications of a change in his work or the function of the Office of Education as the Board of Education became elective under R311/H3308. (Act 547, Acts and Joint Resolutions, S.C., 1982, p. 3495, February 18, 1982.)

5. Prior to July 1, 1982 in addition to being spokesman for the school system, the regular functions of his office included handling of county budgets for the schools of the county, recommending disposition of these to the County Board of Education; examination of monthly invoices before approval of district claims, comparison of all payrolls to pre-obtained job sheets, endorsing of school claims upon determination that all payments were justified, and entering all transactions into the Record of Settlement, Hampton County, South Carolina. Balance of revenue and expenditures were then determined, verified with Hampton County Treasurer on the fifteenth day of each calendar month and reported to the school districts. (The financial reports were also made available to the County Board.) Trustees appointments to the districts were made by the County Board of Education based on information gathered through the superintendent's office. The County Board of Education approved payment of claims for salaries of the county superintendent and staff. Policy for the county-wide food service and attendance programs was set by County Board of Education, however implementation was left to the districts in due regards to their operational authority.

6. July 1, 1982 with the purported enactment of R398/H3645 all receipts stopped coming from Office of the County Treasurer and district claims were submitted by district boards directly to Hampton County Treasurer's office: being paid there provided they carried at least three signatures of trustees from the district upon which the claim was drawn. No records could be kept since all transactions were made without knowledge or approval of the Education Office.

7. Confusion and hardship were generated when no provision was made for County Board of Education office workers or County Superintendent to be paid despite the fact that both South Carolina statutes R398/H3645 and 59-13-10 provided for the office to operate until June 30, 1985. A legal opinion to determine who was empowered to sign the payroll was sought through district school officials. August 23, 1982, United States Assistant Attorney General, William Bradford Reynolds, entered an objection to R398/H3645 making the act become unenforceable.

Affidavit of John W. Dodge, July 13, 1983

8. August 24, 1982, the requested legal opinion was received from District Superintendent Charles Phillips, over the signature of Attorney John P. Linton of the firm of Sinkler, Gibbs and Simons. Substance of the opinion was that payment could be made provided each of the separate school district boards approved the claims.

9. Following the November 23, 1982, action of the United States Assistant Attorney General, William Bradford Reynolds, allowing R398/3645 to become enforceable, receipts and disbursement claims again were not submitted to the Office of the County Superintendent. Office of the County Treasurer began honoring claims drawn without approval of the County Superintendent. No records and no check on the system could be maintained by the County Education Office. The State of South Carolina through action of the Attorney General and Finance Office of the State Department of Education began to dismantle the office by written and verbal orders, some of these having no evident basis in law.

10. As a consequence, financial information, account balances, financial analysis and the system of checks and balances implemented under the Hampton County Board of Education have ceased to be part of the system. No provision for oversight of the system exists. Any appeals from a district school board decision must go to the Circuit Courts of the State of South Carolina.

11. Food Services and Attendance personnel have been removed from the jurisdiction of the County Education Office, with the money required to be transferred to various points: Fund transfers for salaries in some cases were required to be made after the employee had already been paid. This has created confusion and actually caused the county to lose money.

Affidavit of John W. Dodge, July 13, 1983

12. Budgets are now taken directly from the districts to the County Council with no input or record at the County Education Office. District trustees are being elected by popular vote of two separate districts of the county. This allows for no balance of racial composition or county-wide board, and two separate boards, one totally black in District Two and one with four whites and one black in District One, maintain authority over the County Education Office for approval of payroll and expenditures. After the changes cited, District Number One failed to develop an attendance program for 1982-83 year and District Number Two is losing services of the County Food Service Supervisor for 1983-84 year.

13. On information and belief he states that the loss of the aforementioned functions will adversely affect workings of the school system and adversely affect the quality of education dispensed to children in the county system. On information and belief he states that during a majority of the last seven years of his administration he has been the only South Carolina State Board of Education credentialed superintendent practicing in the school system; accordingly the responsibility of explaining policy and performance to a county-wide populace, and the experience and training in dealing with a county-wide constituency have caused him to develop a county-wide perspective on the needs of Hampton County.

/s/ JOHN W. DODGE
John W. Dodge, County Superintendent
Hampton County, South Carolina

Sworn to before me and subscribed
before me this 13th day of July, 1983

/s/ HELEN G. GOUMONE
Notary Public of South Carolina
My commission expires 1/6/91.

Letter of Randolph Murdaugh, III to Daniel R. McLeod, November 29, 1982

November 29, 1982

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear General McLeod:

I have just received a copy of a letter from the U.S. Department of Justice, dated November 19, 1982, and addressed to C. Havird Jones, Jr., an Assistant Attorney General in your office. I am enclosing herewith a copy of that letter. I am also enclosing herewith a copy of a Bill providing for a referendum in Hampton County.

Pursuant to the Bill providing for a referendum an election was held in May of 1982, and the referendum passed. Subsequent thereto the Justice Department objected to the Act establishing the referendum. We thereafter held an election in conjunction with the General Election for a County Board of Education provided for in the enclosed Act, this Act being dated February 18, 1982.

The Justice Department now states that the objection to the referendum is withdrawn. As Chairman of the Hampton County Election Commission I need the following questions answered:

1. Should an election be held to elect trustees for the Hampton County School Districts Nos. 1 and 2?

2. When should such an election be held?

3. Should the filing for the respective district boards be reopened? (I call your attention to the last sentence of

Letter of Randolph Murdaugh, III to Daniel R. McLeod, November 29, 1982

Section 1-B of the Bill establishing the referendum which provides that candidates offering in November of 1982, must file during the period of August 16-31, 1982.)

I would appreciate your advice in these matters.

With kind personal regards, I am

Sincerely yours,

Randolph Murdaugh, III

(10)

No. 83-1015

Office-Supreme Court, U.S.
FILED
AUG 15 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR APPELLANTS

JOHN R. HARPER, II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 771-4723

THOMAS I. ATKINS
MARGARET FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

J. LEVONNE CHAMBERS
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

*Counsel of Record

BEST AVAILABLE COPY

70 pp

QUESTIONS PRESENTED*

(1) Did the District Court err in holding that, in preclearing an election law under section 5 of the Voting Rights Act, the Attorney General must be deemed to preclear as well all future changes in election practices and procedures which may occur in the implementation of that law?

(2) Did the District Court err in holding that changes in election practices and procedures need not be precleared under section 5 of the Voting Rights Act if those changes occur in the implementation of a separate election law which itself had earlier received such preclearance?

---

* The parties to this appeal are set out at p. ii of the Jurisdictional Statement.

(3) Did the District Court err in holding that the implementation of a non-precleared change in election procedures cannot be enjoined under section 5 of the Voting Rights Act unless that change is in fact "alleged to have had either racially discriminatory purpose or effect?"

(4) Did the District Court err in holding that state action knowingly and illegally implementing a change in election law to which the Attorney General had objected under section 5 is never to be invalidated by the federal courts so long as that change subsequently receives preclearance?.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Opinion Below	2
Jurisdiction	2
Statutes Involved	3
Statement of the Case	3
Summary of Argument	14
Argument	19
I. The Nature of the Changes in Appellees' Election Practices.....	22
II. The Changes in Appellees' Election Practices Lack The Necessary Preclearance Under Section 5 of the Voting Rights Act	29
(1) The "Ministerial Act" Exception.....	30
(2) Preclearance of Unknown Future Changes	33
(3) "Retroactive Validation".....	38
(4) The Requirement of a Claim of Discrimination	44

	Page
Conclusion	46
APPENDIX-	
Voting Rights Act of 1965, Section 5	1a
Act No. 547, South Carolina Laws (1982)	5a
Act No. 549, South Carolina Laws (1982)	8a

TABLE OF AUTHORITIES

Cases	Page
Allen v. State Board of Elections, 393 U.S. 544 (1969)	17, 19,23,25,32, 34,38,41,44
Berry v. Doles, 438 U.S. 190 (1978)	15, 23,40,41,43
City of Rome v. United States, 446 U.S. 156 (1980)	24,32, 33-34
Conner v. Waller, 421 U.S. 565 (1975)	20,27
Dougherty County v. White, 439 U.S. 32 (1978)	25,26,45
Georgia v. United States, 411 U.S. 526 (1973)	36
Hadnott v. Amos, 394 U.S. 358 (1968)	15,25
McCain v. Lybrand, 79 L.Ed.2d 271 (1984)	17,19, 20,36,37,45
McDaniel v. Sanchez, 452 U.S. 130 (1981)	19,20
Perkins v. Mathews, 400 U.S. 379 (1971)	18, 31,40,41,45

Cases **Page**

United States v. Board of Supervisors, 429 U.S. 642 (1977) 45

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) 34

Whitley v. Williams, 393 U.S. 544 (1969) 15,25

Statutes

28 U.S.C. § 1253 3

28 U.S.C. § 2101 2

42 U.S.C. § 1973(c) 14,22

Section 5, Voting Rights Act of 1965, 42 U.S.C. § 1973c .....Passim

Act No. 547, South Carolina Laws (1982) 3,4,9,39

Act No. 549, South Carolina Laws (1982) 3,6 7,8-9,12,22 24,26,28,30 33,35,38,39

Regulations:

28 C.F.R. § 51.12(g) 25

28 C.F.R. § 51.12(k) 16,29

28 C.F.R. § 51.20 7

Cases **Page**

Rules:

Rule 6(a), Federal Rules of Civil Procedure 2

Rule 29.1, Supreme Court Rules 2

Legislative Materials:

S. Rep. No. 97-417 (1982) 20,21,42

H.R. Rep. No. 97-227 (1981) 20,21,42

No. 83-1015

==========

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., et al.,

Appellees.

On Appeal From the United States District Court For The District of South Carolina

---

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the district court of September 9, 1983, which is not reported, is set out at pp. 1a-11a of the appendix to the Jurisdictional Statement.

Jurisdiction

The order of the three-judge district court, denying injunctive relief and dismissing the complaint insofar as it sought relief under section 5 of the Voting Rights Act, was entered on September 9, 1983. (J.S. App. 1a). A timely notice of appeal was filed on October 10, 1983.[1] (J.S. App. 12a). See 28 U.S.C. § 2101(b). On December 7, 1983, the Chief Justice extended the date for docketing this appeal until December 16,

[1] The thirtieth day after September 9, 1983, was a Sunday, October 9, 1983. Accordingly, the notice of appeal was due on October 10, 1983, the date on which it was filed. Rule 6(a), Federal Rules of Civil Procedure; Supreme Court Rule 29.1.

1983. The appeal was docketed on December 16, 1983. Probable jurisdiction was noted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Statutes Involved

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set out at pp. 1a-5a of the appendix hereto. Acts 547 and 549 of the South Carolina Laws of 1982 are set out at pp. 5a-8a and pp. 8a-13a of the appendix.

Statement of the Case

From prior to 1964 until 1982 the Hampton County public school system was controlled by the Hampton County Board of Education. During this period the six members of the County Board were appointed by the Hampton County members of the South Carolina legislature. The school system was in turn divided into two school districts with separate Boards of Trus-

tees, whose members were appointed by the County Board. Over 91% of all white public school students in the county attend the schools in District No. 1, while the student population of the District No. 2 schools is 92% black. Each school district has operated autonomously under the general supervision of the County Board and of an elected County Superintendent of Education.

On February 18, 1982, the South Carolina legislature enacted Act 547, which provided that, beginning January 1, 1983, the six members of the County Board were to be elected rather than appointed. (App. 10a-11a). The Superintendent of Education, while continuing to be elected at-large, was to serve as a seventh voting member of the newly constituted County Board. The first elections for the new County Board were to be conducted in November, 1982. The purpose for electing

the County Board members, rather than appointing them, was apparently to create a County Board responsive to consolidating School Districts Nos. 1 and 2. Act 547 was promptly submitted to the United States Attorney General for preclearance under section 5 of the Voting Rights Act, and received that preclearance on April 28, 1982. (J.A. 52a).

The adoption of Act 547, however, provoked substantial opposition among the white residents of District No. 1. According to the complaint, those whites circulated a petition calling for the abolition of both the County Board and the position of County Superintendent of Education, thus severing the connection between Districts One and Two. (J.A. 11a). As a result of that petition, and with the backing of the Hampton County Council, a white member of the county legislative delegation introduced legisla-

tion to overturn Act 547. This new measure was enacted on April 9, 1982 as Act 549. (App. 8a-13a). Act 549 abolished the Hampton County Board of Education and provided that its duties were to be assumed by the Trustees of School Districts 1 and 2. Beginning in November, 1982, the Trustees of those school districts were to be elected at-large at the general election. Act 549 provided that candidates for election to these newly reconstituted school boards were to file with the county Election Commission between August 16 and 31, 1982. Act 549 also abolished, as of June 30, 1985, the elected position of Superintendent of Education. Implementation of Act 549, however, required approval of a referendum of Hampton County voters to be conducted in May, 1982.

When Act 549 was adopted by the legislature there was ample time, a total

of 129 days, to obtain preclearance before the scheduled filing period was to begin on August 16. Although the Department of Justice regulations expressly authorized consideration of a preclearance request prior to the holding of any necessary referendum, 28 C.F.R. § 51.20, no effort was made to submit Act 549 during either April or May of 1982. When the county referendum approved Act 549 on May 25, 1982, there still remained sufficient time, 83 days, in which to obtain preclearance prior to the commencement of the filing period. But state and local officials delayed still further. Not until June 22, 1982, some 28 days later, was the submission received by the United States Attorney General (J.A. 58a); a total of 74 days elapsed between the enactment of Act No. 549 by the state legislature and the submission of the Act to the Attorney General. By June 28 the

time remaining until the statutory filing period was to begin was less than the 60 days normally required for preclearance under section 5.

As a result of these delays, the Attorney General had taken no action on Act 549 when the filing period for elections under that Act commenced on August 16, 1982. Despite the fact that section 5 of the Voting Rights Act forbids any implementation of a new election practice or procedure which lacks preclearance, Hampton County election officials, who were well aware of the requirements of federal law, began to accept petitions from candidates seeking election in the new districts created by Act 549. On August 23, 1982, the Attorney General objected to Act 549 insofar as it abolished the County Board. (J.A. 58a). Despite this objection, Hampton County officials continued to implement the Act

549 filing period. On September 1, 1982, after that filing period had ended, county officials submitted to the Attorney General a request for reconsideration of his objection. (J.A. 63a-65a). They also began for the first time to accept filings for election under Act 547, the only law which then had the necessary preclearance. On November 2, 1982, having received no response to their request for reconsideration, county election officials held elections for the County Board under Act 547. Of the six board members elected on that date, three were black and three were white.

On November 19, 1982, the Attorney General withdrew his objection to Act 549. (J.A. 65a). On November 29, 1982, the chairman of the Hampton County Election Commission wrote the South Carolina Attorney General and requested his opinion on three questions:

(1) Should an election be held to elect Trustees for Hampton County School Districts 1 and 2?

(2) If so, when should such an election be held?

(3) Should the filing period for the respective District Boards of Trustees be "reopened"? (J.A. 74a).

The state Attorney General responded on January 4, 1983, advising the County that it should hold new elections "[a]s soon as possible" and that it need not "reopen" the filing period. (J.A. 67a). Acting on this advice, the Hampton County Election Commission conducted elections in Districts 1 and 2 on March 15, 1983. The six individuals elected in November, 1982, to the County Board of Education were never permitted to take office.

The advice given by the state Attorney General and acted upon by the county had two distinct effects of

BEST AVAILABLE COPY

importance to this litigation. First, although the express language of Act 549 authorized election of District Trustees only during a general election, the Trustees were in fact chosen at a special off-year election. Second, despite the fact that Act 549 contemplated that the filing period would begin several months after the Act went into effect, the filing period for the 1983 election in fact closed more than two months before the statute became effective. Thus the only time at which candidates for District Trustee were permitted to file for that office was when the conduct of such filings was illegal under section 5 of the Voting Rights Act.

The appellants, two civil rights organizations and several residents of Hampton County, commenced this action in the United States District Court for the District of South Carolina seeking an

injunction to forbid the proposed elections as illegal under section 5 of the Voting Rights Act,[2] and to place in office the duly elected members of the County Board of Education. Appellants alleged that the proposed elections violated section 5 because they were to occur at a time other than that provided for in Act 549, and because the elections were limited to candidates who had filed for election during the illegal August 1982

2 The complaint also alleged that the Election Commission, in violation of section 3 of Act No. 549, had failed to certify to the South Carolina Code Commissioner the results of the May 1982 referendum. (J.A. 17a-18a). Although we disagree with the district court's reasons for rejecting this claim, our review of the record indicates that that certification was in fact made. Accordingly, we do not seek review of the district court's denial of injunctive relief regarding the alleged lack of certification.

filing period.[3] Appellants also alleged that the defendants had already stripped of all authority the elected Superintendent of Education, some two years earlier than authorized by the statute approved by the Attorney General under section 5. (J.A. 18a, 70a).

Appellants unsuccessfully sought a preliminary injunction to prevent the holding of the March, 1983 special election. The single judge to whom that request was made denied it on the express premise, concurred in by counsel for appellees, that the results of the March election would be invalidated if the election were subsequently held to violate section 5:

3 The complaint also alleged that the abolition of the elected County Board of Education violated section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. (J.A. 22a-23a). These claims were not dismissed, and are the subject of continuing litigation in the district court.

> THE COURT: What's going to happen if a three Judge Court hears it and they say you were wrong.... They would set the election aside and go all -- have to go all over it again.
>
> [COUNSEL FOR SCHOOL BOARDS]: Exactly. I think that's exactly right.[4]

Subsequently a three judge court was convened to hear the case, as required by 42 U.S.C. § 1973c. On September 9, 1983, the district court denied appellants' request for injunctive relief and dismissed their complaint insofar as it sought to state a claim under section 5 of the Voting Rights Act. (J.S. App. 1a-11a).

SUMMARY OF ARGUMENT

I.

This case involves three changes in the South Carolina election practices with regard to the election of school officials

4 Transcript of Hearing of March 14, 1983, pp. 18-19.

in Hampton County.

First the date for the election of trustees of the local school boards was shifted from November 1982 to March 1983. This Court has previously held that a change in the date of an election is subject to section 5 of the Voting Rights Act. Berry v. Doles, 438 U. S. 190 (1978).

Second, August 16-31, 1982, was established as the period during which candidates were required to file for the March 1983 elections. Prior to the decision to set that filing period, state law did not provide for any filing period for a March election. This Court has repeatedly held that candidate filing rules are subject to section 5. Hadnott v. Amos, 394 U.S. 358 (1969); Whitley v. Williams, 393 U.S. 544, 570 (1969).

Third, the defendants allegedly abolished as a practical matter by the spring of 1983 the elected position of

County Superintendent of Education, stripping the occupant of that office of his authority. State legislation approved by the Attorney General under section 5 did not authorize the abolition of that office until 1985. A shortening of the term of office of an elected official is subject to section 5. 28 C.F.R. § 51.12 (k).

II.

The district court in holding that these changes did not require submission under Section 5 improperly established four new exceptions to the requirements of the Voting Rights Act.

(1) The district court held that any alteration of election practices was not a "change" within the scope of section 5 if that alteration occurred in connection with the implementation of another law which had itself been precleared. On this view, once a single new election law is

precleared, state authorities are free to adopt any related rules they please with regard to registration, voting, or candidates, without obtaining preclearance under the Voting Rights Act. Such a rule is clearly inconsistent with the decisions of this Court that Congress intended "to give the Act the broadest possible scope." Allen v. Board of Elections, 393 U.S. 544, 567 (1969).

(2) The district court held that when the Attorney General preclears a new state election law, he implicitly preclears in advance all subsequent changes in election practices which are made in the implementation of that law. This Court held in McCain v. Lybrand, 79 L.Ed.2d 271 (1984), that the Attorney General could not be deemed to have approved election laws of which he was actually aware unless those changes were formally submitted for preclearance. A

fortiori the Attorney General cannot be deemed to have approved unknown future changes of which he was not and could not have been aware.

(3) The district court held that if a covered jurisdiction violates section 5 by implementing a new election law which lacks preclearance, a subsequent preclearance of the law automatically renders lawful the previous violation of federal law. Perkins v. Mathews, 400 U.S. 379 (1971), however, held that whether such subsequent preclearance removes the need for further relief must be resolved based on the particular circumstances of each case.

(4) The district court held that an allegation of "either racially discriminatory purpose or effect" is "essential to a section 5 action." This Court has repeatedly held that no such claim is necessary in an action to enforce section

5. Allen v. Board of Elections, 393 U.S. 544, 558-59 (1969).

ARGUMENT

The familiar provisions of section 5 of the Voting Rights Act were first enacted in 1965 to prevent the implementation of any changes in election practices and procedures in the jurisdictions covered by section 5 until and unless there was a determination that those changes had no discriminatory purpose or effect. Section 5 requires that, prior to any such implementation, alterations in state or local election practices must be submitted for approval by either the Attorney General or the District Court for the District of Columbia.[5] Any practices constituting changes in election procedures are not "effective as laws until and

[5] Those procedures were described in detail in past decisions of this Court. McCain v. Lybrand, 79 L.Ed.2d 271, 278-80 (1984); McDaniel v. Sanchez, 452 U.S. 130, 137 and cases cited at n. 14 (1981).

unless cleared pursuant to § 5." Conner v. Waller, 421 U.S. 656, 656 (1975) (per curiam).

Congress' decision to renew the Voting Rights Act in 1970 and 1975 was based to a significant degree on its conclusion that there had been widespread violations of section 5. McCain v. Lybrand, 79 L.Ed. 2d 271, 281, 284 n. 23 (1984). That same problem lay behind the renewal of the Act in 1982.[6] The Senate report of that year noted:

> Noncompliance generally has taken two forms. First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. Second, there continue to be instances of changes having been implemented despite a prior Department of Justice objection.[7]

6 Because the 1982 extension of the Voting Rights Act is the controlling statute in this case, the legislative history of that extension is of particular relevance. McDaniel v. Sanchez, 452 U.S. 130, 147 n. 25 (1981).

7 S. Rep. No. 97-417, p. 13 (1982); see also H.R. Rep. No. 97-227, p. 13 (1981).

The House report found that in 1980 alone the Attorney General had been forced to formally request the submission of 124 changes which never received section 5 preclearance.[8] The Senate report emphasized that this continuing pattern of illegality was particularly inexcusable years after the validity and scope of section 5 had been resolved, and noted that minority voters often found it necessary to file suit to compel compliance with section 5.[9] This is such an action.

I. THE NATURE OF THE CHANGES IN APPELLEES' ELECTION PRACTICES

This appeal involves three distinct election practices which were not in effect on November 1, 1964, the date after which all changes in election procedures

8 H.R. Rep. No. 97-227, p. 13.

9 S. Rep. No. 97-417, p. 48 (1982).

require section 5 preclearance.

The first such change in election practices was the alteration of the date for conducting the initial election of the trustees of the local school boards from November 1982 to March 1983. As of November 1, 1964, of course, no elections for those boards, and thus no election dates, were authorized. Act No. 549, which provided for such elections and ultimately received section 5 preclearance, authorized the election of district trustees only at the "general election" held in November of even-numbered years in South Carolina.

If South Carolina had enacted a statute altering the election date from the November general election to March of an off-year, such legislation would clearly have been a change in a "standard, practice or procedure with respect to voting..." 42 U.S.C. § 1973c. This Court

has repeatedly held that Congress intended section 5 "to reach any state enactment which altered the election law of a covered State in even a minor way." Allen v. State Board of Elections, 393 U.S. 544, 566 (1969). In Berry v. Doles, 438 U.S. 190 (1978), this Court held that section 5 applied to a state statute changing the time at which certain Georgia county officials were to be elected. The result is no different merely because here the change was achieved without any formal legislation. Such a change in the timing of an election has an obvious potential adverse impact on the number of minority voters participating when, as here, the election is moved from a regular general election to a special election, since voter turnout at special elections is predictably lower. In the instant case, for example, over 6000 Hampton County voters participated in the November 1982

general election,[10] while less than half that number voted in the March 1983 special election.

Second, the procedures adopted by appellees effectively constituted a change in the candidate filing rules. Act 549, as approved by the Attorney general, authorized only two filing periods, the August 16-31 period for a contemplated November, 1982, school board election, and the usual filing period for subsequent school board elections. The Act neither established any filing period for a March 1983 special election, nor sanctioned the use of the August 1982 filings for any election other than that to occur in November, 1982.

This Court has repeatedly held that candidate qualification rules are subject to section 5. City of Rome v. United States, 446 U.S. 156, 160-61 (1980)

---

10 Complaint, Exhibit 15-1.

(residence requirement); Dougherty County v. White, 439 U.S. 32 (1978) (mandatory leave for candidate in government job); Hadnott v. Amos, 394 U.S. 358 (1969) (filing requirements for independent candidates); Whitley v. Williams, 393 U.S. 544, 570 (1969) (filing requirements for independent candidates). The Justice Department section 5 regulations expressly require submission of "[a]ny change affecting the eligibility of persons to become candidates." 28 C.F.R. § 51.12(g). Submission of changes in such laws is required because candidate qualification rules may "undermine the effectiveness of voters who wish to elect ... candidates" excluded by those rules. Allen v. Board of Elections, 393 U.S. at 570.

The new filing rule at issue in this case to an extraordinary degree "burdens entry into elective campaigns and, concomitantly, limits the choices

available to voters." Dougherty County v. White, 439 U.S. at 40. The standard adopted in January 1983 for the March 1983 special election required prospective candidates to have filed no later than August 31, 1982. By the time that that requirement was announced, the deadline it imposed was more than four months past. This unusual ex post facto requirement had an obvious discriminatory impact. First, the March special election was open only to candidates who had been willing to participate in the palpably illegal August 1982 filing, which had been conducted at a time when implementation of Act No. 549 violated section 5. Prospective candidates[11] could only obtain a place on the

---

11 Several blacks sought unsuccessfully to file for elction to the local boards following the January, 1983 announcement that there would be an election in March. Among those prevented from seeking office was appellant Brooks, a former member of the County Board of Education. (J.A. 14a-15a).

March 1983 ballot by "obeying" in August 1982 election rules to which an objection had been interposed by the Attorney General and which under the Voting Rights Act were not and could not then have been "effective as laws." Connor v. Waller, 421 U.S. 656 (1975). Second, since only one black candidate[12] had filed for election as a trustee of District No. 1 during the illegal August 1982 filing period, the rule guaranteed white domination of that District regardless of the wishes of minority voters, and deprived those voters of any opportunity to vote for more than a single black candidate. Thus, had the decision to require an August, 1982 filing been submitted to the Attorney General, there is good reason to believe that he would have objected to it.

---

12 Lenon Brooker. He was among the five candidates elected in March, 1983.

Third, the complaint alleged that in early 1983 the appellees had as a practical matter abolished the elected position of County Superintendent of Education. (J.A. 18a-19a). An affidavit of the Superintendent detailed the manner in which, as early as July 1, 1982, he had been largely stripped of his authority. (J.A. 70a-73a). On a motion to dismiss the district court was obligated to accept these allegations as true. The elected position of Superintendent of Education existed prior to 1982. The current four year term of Superintendent Dodge does not expire until June 30, 1985. Act No. 549 provides for the abolition of that position as of June 30, 1985, but does not alter the authority of the Superintendent prior to that date. If, as alleged, the appellees have effectively shortened the term of the Superintendent of Education, that is clearly a change covered by

section 5. Section 51.12(k) of the Department of Justice regulations provides that section 5 applies to "[a]ny change in the term of an elective office ... e.g. by shortening the term of an office...."[13]

II. THE CHANGES IN APPELLEES' ELECTION PRACTICES LACK THE NECESSARY PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT.

The district court concluded that none of the election practice changes at issue in this case required a formal preclearance under section 5 of the Voting Rights Act. The district court offered several distinct theories for reaching this conclusion, each of which, we urge, was clearly inconsistent with the decisions of this Court.

---

[13] The district court's opinion contains no clear explanation of why that court rejected this claim. We assume that the lower court did so because of one of the doctrines discussed infra.

(1) The "Ministerial Act" Exception

The district court reasoned, first, that once an election law is precleared, section 5 is simply inapplicable to any alterations in election procedures which occur in the implementation of that precleared law. Thus the new procedures involved in this case, it asserted, did not

> constitute "changes" within the meaning of Section 5. Each of these acts were not alterations of South Carolina law, but rather steps in the implementation of a new statute.... [T]he preclearance requirement of Section 5 applied to the new statute, Act No. 549, while the ministerial acts necessary to accomplish the statute's purpose were not "changes" contemplated by Section 5, and thus did not require preclearance. (J.S. App. 8a-9a).

On the district court's view, once Act 549 was precleared, Hampton County election officials were free to select any date for the trustee elections and to adopt any filing requirement, regardless of whether,

as in fact occurred, the date and filing requirement were different than those in the Act submitted to and approved by the Attorney General of the United States.

Under the theory advanced by the district court, the preclearance of any single election law automatically carries with it a sort of prospective indulgence, immunizing from section 5 scrutiny any subsequent change in election law practice or procedure so long as that change is somehow related to the implementation of the approved statute. This Court has consistently refused to create an exception to section 5 for purportedly "minor" changes made by local election officials, see e.g. Perkins v. Mathews, 400 U.S. 379 (1971), and the Attorney General has properly insisted that even those technical changes in election procedures needed to implement longstanding election laws must be submitted for preclearance.

City of Rome v. United States, 446 U.S. 156, 183 (1980).

The changes at issue in this case were in fact far from minor. On the contrary, they involved a change in the date of an election, an alteration of the filing requirements for one office, and the effective abolition in mid-term of another elective office. Under the doctrine espoused by the district court, any choice made by election officials, regardless of its practical importance, is outside the scope of section 5 so long as the choice was made in connection with a new election law. Such a sweeping exemption from the coverage of section 5, carrying with it an open invitation to evasion of the requirements of the Voting Rights Act, is clearly inconsistent with the intent of Congress "to give the Act the broadest possible scope." Allen v. Board of Elections, 393 U.S. at 567.

(2) Preclearance of Unknown Future Changes

The district court suggested, in the alternative, that the new election procedures at issue in this case had somehow "been precleared along with the ... provisions of Act No. 549." (J.S. App. 9a). In particular the court asserted, apparently with regard to the illegal August 1982 filing period, that "the eventual preclearance of Act 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished." (App. 10a).

This Court, however, has repeatedly rejected suggestions that the Attorney General be deemed to have approved changes in election procedures where those changes were not formally submitted to him in full compliance with the applicable section 5 regulations. City of Rome v. United

States, 446 U.S. at 169 n. 6; United States v. Sheffield Board of Commissioners, 435 U.S. 110, 136 (1978); Allen v. Board of Elections, 393 U.S. at 571. Even if the Attorney General had known of the proposed changes in this case, that would not have been sufficient; the responsible authorities must "in some unambiguous and recordable manner submit any legislation or regulation in question to the Attorney General with a request for his consideration pursuant to the Act." Allen v. Board of Elections, 393 U.S. at 571. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." United States v. Sheffield Board of Commissioners, 435 U.S. at 136.

In the instant case the Attorney General could not possibly have evaluated or intended to approve the changes at issue when he withdrew his objection to Act 549, since that objection was withdrawn in November, 1982, and the decisions at issue -- to hold a special election and to require candidates to have registered in August, 1982 -- were made in January 1983, two months after the Attorney General's action. If a decision by the Attorney General to preclear a new statute has the sweeping effect attributed to it by the district court, approving as well both premature implementing steps of which the Attorney General may be unaware, and subsequent implementation actions which he could not foresee, it would be impossible for the Attorney General to carry out his responsibilities under section 5 in an informed and conscientious manner. Under the best of circumstances

"[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia v. United States, 411 U.S. 526, 540 (1973). But if the Attorney General cannot know in advance what implementing steps he is implicitly approving, it would be manifestly impossible to make the critical judgment which Congress contemplated.

This aspect of the district court's opinion presents in a more extreme form the argument unanimously rejected by this Court last term in McCain v. Lybrand, 79 L.Ed.2d 271 (1984). In McCain the defendant officials urged that a 1966 statute had been precleared by the Attorney General, even though that statute had only been provided to the Attorney General in connection with the submission of a separate law adopted in 1971, and

despite the fact that no formal request had ever been made for approval of the earlier measure. Although the Attorney General in McCain actually knew of the existence of the 1966 statute, this Court declined to assume, as South Carolina officials there urged, that the Attorney General had tacitly given his approval to that statute, explaining that to do so "would require a wild flight of imagination." 79 L.Ed.2d at 285. The suggestions of the district court in this case, that the Attorney General somehow approved in November, 1982, of changes which were not even decided upon until 1983, and which it was thus literally impossible that the Attorney General knew about at the time, is even less plausible than the flight of imagination spurned by this Court in McCain.

(3) "Retroactive Validation"

The district court also held that the November, 1982, preclearance of Act 549 ipso facto removed all taint of illegality from the August 1982 filing period. Relying on this Court's decision in Berry v. Doles, 438 U.S. 190 (1978), the court below held that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval." (J.S. App. 10a). The appellee Election Commission characterizes this "principle of retroactive approval"[14] as meaning that the approval of a change in election law under section 5 automatically and invariably approves nunc pro tunc all violations of the Voting Rights Act occasioned by the illegal implementation of that new state law. Because of this rule, the Commission suggests, so

14 Election Commission Motion to Affirm, p. 17.

long as Act 547 had not yet been rejected by the Attorney General under section 5, local officials would have been "derelict in their duty"[15] if they had failed to enforce that change in state election law. Even after the Attorney General disapproved Act 549, further implementation, the Commission asserts, was "necessitat[ed]" by the fact that a request for reconsideration was pending.[16] In the Commission's view the decision below not merely permits but actually requires local authorities to implement an unapproved change in election law in violation of the Voting Rights Act so long as there is any hope that that violation will later be forgiven under the "principle of retroactive approval." Because of this principle, the Commission asserts, the issuance of an injunction against the

15 Id. p. 10.
16 Id., 17 n. 2.

holding of an election which violates section 5 should be "the exceptional remedy rather than the normal one."[17]

This extreme rule of retroactive approval finds no support in the decisions of this Court. In Berry, as in Perkins v. Mathews, 400 U.S. 379 (1971), the issue before this Court was whether an election held without the necessary section 5 preclearance should be voided and conducted anew even though the changes at issue subsequently received the required preclearance. Neither case established a per se rule that such relief was never appropriate. Perkins held only that "[i]n certain circumstances" invalidation of an action taken in violation of section 5 might not be required, 400 U.S. at 396, and Berry merely found such circumstances to be present on the particular facts of that case. 438 U.S. at 192. On remand in

17 Id., 12 n. 1.

Perkins the district court in fact ordered a new election despite the fact that the new election law prematurely implemented at the previous election had subsequently been approved by the Attorney General.[18] Both Perkins and Berry recognized the desire of Congress to prevent the implementation of all election changes which had not received section 5 preclearance, not just those to which such preclearance would ultimately be denied.

Fourteen years ago, noting that the scope of section 5 raised "complex issues of first impression", this Court indicated a temporary reluctance to overturn elections conducted without preclearance. Allen v. Board of Elections, 393 U.S. at 572. In extending section 5 in 1982, however, Congress made clear its desire that the Voting Rights Act be strictly

18 Supplemental Judgment, June 19, 1972, p. 2.

complied with. Congress amended the bailout provisions of the Act to ensure that exemption from coverage by section 5 not be accorded to jurisdictions which had violated that provision. The Senate Report emphasized:

> [I]t is the Committee's intent that compliance with Section 5 means that even if an objection is ultimately withdrawn or the judgment of the District Court for the District of Columbia denying a declaratory judgment is vacated on appeal, the jurisdiction is still in violation if it had tried to implement the change while the objection or declaratory judgment denial was in effect. S.Rep. No. 97-417, p. 48.

Virtually identical language appears in the House Report. H.R. Rep. No. 97-227, p. 42. Both the House and Senate Reports include extensive references to the failure of covered jurisdictions to make the timely submissions required by section 5. (See p. 20-22, supra.)

As Justice Brennan noted in his concurring opinion in Berry, in the absence of any credible threat that actions violative of section 5 will be invalidated by the federal courts, "the political units covered by §5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes." 438 U.S. at 194. That is exactly what occurred in the instant case. The defendant election officials knowingly implemented Act 549 when it lacked section 5 preclearance, in the hope that such preclearance would eventually be obtained, and in the apparent belief that subsequent preclearance would immunize from redress that violation of federal law. The district court's decision encourages precisely the sort of section 5 violation which undeniably occurred in August 1982,

and flies in the face of the clear intent of Congress.

(4) The Requirement of a Claim of Discrimination

Finally, the district court held that an allegation of "either racially discriminatory purpose or effect" was "essential to a Section 5 action." (J.S. App. 8a). This is a thinly disguised version of a construction of section 5 that has been repeatedly and unanimously rejected by this Court. In Allen v. Board of Elections this Court held:

> A declaratory judgment brought by the State pursuant to §5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a private litigant does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. 393 U.S. at 558-59. (Emphasis in original).

In Perkins v. Matthews, 400 U.S. 410 (1971), the district court dismissed a section 5 action because it believed that the election law changes at issue lacked any discriminatory purpose or effect. This Court reversed:

> The three-judge court misconceived the permissible scope of its inquiry into [plaintiff's] allegations.... What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General -- the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color." 400 U.S. at 383-85.

That rule has since been reaffirmed in Dougherty County v. White, 439 U.S. 32, 42 (1978), United States v. Board of Supervisors, 429 U.S. 642, 645-46 (1977), and McCain v. Lybrand, 79 L.Ed.2d 271, 282 n. 17 (1984). Neither the evidence adduced

in a private action to enforce section 5, nor the allegations of the complaint in such an action, are to be tested by standards which Congress has expressly reserved to a preclearance proceeding in the District Court for the District of Columbia or before the Attorney General.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

JOHN R. HARPER, II *
3706 North Main Street
Post Office Box 843
Columbia, S.C. 29202
(803) 771-4723

THOMAS I. ATKINS
MAGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

J. LeVONNE CHAMBERS
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

* Counsel of Record

VOTING RIGHTS ACT OF 1965, SECTION 5

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, provides:

> §1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court
>
> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in

force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the

United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequiste, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted

by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objections will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney

General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

ACT NO. 547, SOUTH CAROLINA LAWS (1982)

Act No. 547, South Carolina Laws 1982, provides:

Composition of Hampton County Board of Education SECTION 1. Notwithstanding any other provision of law, beginning January 1, 1983, the Hampton County Board of Education shall be constituted and elected as follows:

A. (1) Six members shall be elected at large from the county in an election conducted by the county election commission at the time general elections are held beginning with the general election of 1982.

(2) To have his name placed on the ballot a person must file with the election commission, not less than forty-five days before the election, a petition signed by not less than fifty qualified electors of the county. Each signature shall be followed by the voter registration number of the petitioner. Petitions must be approved by the county board of voter registration.

(3) No political party designation shall appear on the ballot in connection with the names of candidates.

(4) The six candidates receiving the highest vote in the election shall be declared elected. In the event of a tie vote, procedures provided in the state election laws shall apply.

B. Terms of members shall be for four years and until their successors are elected and qualify except that in the initial election of 1982 the three members elected who receive the smallest vote shall serve initial terms of two years only.

C. Vacancies shall be filled in the next general election for a full term or unexpired term as the case may be except that if a vacancy occurs more than one year prior to a general election it shall be filled by appointment by the Governor upon recommendation of a majority of the county legislative delegation for a period until the vacancy can be filled by election.

D. In addition to the elected members, the county superintendent of education shall serve ex officio as a member of the board and in such capacity shall have all rights and privileges of other board members, including the right to vote.

E. As of December 31, 1982, the terms of all board members then serving shall expire.

F. Except as provided in this act the powers, duties and procedures of the board as prescribed by law shall continue in full force and effect.

Time effective

SECTION 2. This act shall take effect upon approval by the Governor.

ACT NO. 549, SOUTH CAROLINA LAWS (1982)

Act No. 549, South Carolina Laws, provides:

Board of education abolished, trustees elected

SECTION 1. Contingent upon approval of the total proposal by a majority of the qualified electors voting in a referendum to be held in May, 1982, as hereafter provided for, the following shall occur:

(a) The Hampton County Board of Education shall be abolished at midnight on June 30, 1982; the office of the Hampton County Superintendent of Education shall be abolished at midnight on June 30, 1985; upon abolition their respective duties shall devolve upon the trustees for Hampton County School Districts Nos. 1 and 2; and after June 30, 1982, the Hampton County Treasurer shall pay any proper claim approved by a majority of the trustees of either School District No. 1 or School District No. 2, on behalf of

their respective district, provided sufficient funds are on deposit in the proper district account.

(b) Beginning with the general election in November, 1982, trustees for Hampton County School Districts Nos. 1 and 2 shall be elected by a plurality vote of the electors within their respective district qualified and voting at the general election for representatives. The number of trustees shall be five for each school district and their terms of office shall begin January 1, 1983. The three candidates in each district receiving the highest number of votes shall serve for terms of four years and the remaining two trustees shall have initial terms of two years, after which all terms shall be for four years. In each case trustees shall serve until their successors are elected and qualify and each school board shall elect its chairman annually. Trustees

shall receive no salary but shall be reimbursed for actual expenses incurred. A candidate for membership on a school board must reside in the school district he seeks to represent and all candidates offering for election in November, 1982, must file during the period August 16-31, 1982.

Referendum conducted

SECTION 2. The Hampton County Commissioners of Election shall conduct a referendum within the respective county school districts during May, 1982, to determine whether the provisions of Section 1 of this act shall be implemented. The specific date for the referendum shall be determined by the county election commission. The county election commission shall thrice publish notice of the referendum in a newspaper of

a countywide circulation, the last publication to be not less than one nor more than two weeks before the referendum. All election laws contained in Title 7 of the 1976 Code applicable to county referendums shall apply. Ballots shall be prepared and distributed to the various voting precincts of the county with the following printed thereon:

"Shall the Hampton County Board of Education be abolished on June 30, 19872, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; shall the office of the Hampton County Superintendent of Education be abolished on June 30, 1985, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; and shall the trustees for Hampton County School Districts Nos. 1 and 2 (five trustees per district), rather than being appointed, byu elected by plurality vote

during general elections for representative beginning with the election in November, 1982, with their terms to begin January 1, 1983, and with terms of office to be four years, except that of those initially elected two from each district shall have initial terms of two years?

I agree to the above proposals ____

Yes ____ No

Place a check or cross mark in the block which expresses your answer."

SECTION 3. The Hampton County Commissioners of Election shall certify the results of the referendum directed in Section 2 of this act to the Hampton County Legislative Delegation and to the South Carolina Code Commissioner.

Office-Supreme Court, U.S.
FILED
SEP 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

BRIEF FOR APPELLEES

T. TRAVIS MEDLOCK
Attorney General
TREVA G. ASHWORTH*
Senior Assistant
Attorney General
J. EMORY SMITH, JR.
Assistant Attorney
General

P. O. Box 11549
Columbia, SC 292[illegible]

Attorneys for Appellees
Hampton County Election
Commission, Its Members,
Hampton County Treasurer

*Counsel of Record

BEST AVAILABLE COPY

No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

BRIEF FOR APPELLEES

T. TRAVIS MEDLOCK
Attorney General
TREVA G. ASHWORTH*
Senior Assistant
Attorney General
J. EMORY SMITH, JR.
Assistant Attorney
General

P. O. Box 11549
Columbia, SC 29211

Attorneys for Appellees
Hampton County Election
Commission, Its Members,
Hampton County Treasurer

*Counsel of Record

No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

BRIEF FOR APPELLEES
Hampton County Election Commission, Its Members, Hampton County Treasurer

INDEX

Page

Table of Authorities.....iv

Questions Presented..... 1

Statement of the Case..... 2

Summary of Argument..... 8

Argument.....10

I. Hampton County Did Not Attempt to Implement An Unprecleared Change.....10

II. Hampton County Can Proceed With The Preliminary Step of Filing Under An Act That Is Awaiting Preclearance 19

A. Allowing Filing For An Office Does Not Constitute An Improper Enforcement Of An Election Law While Awaiting Its Preclearance.....19

B. The Initiation Of Preliminary Steps As Well As The Enforcement Of Actual Changes Prior To Preclearance Has Been Permitted By The Justice Department And The Courts.....24

III. When Preclearance is Received After Time of Election Specified in The Act, Holding The Election At a Time Subsequent Constitutes An "Unfreezing" of The Election Process And Not An Improper Enforcement of The Precleared Submission.....30

INDEX - Continued

Page

IV. Hampton County Was Operating Within The Scope of The Voting Rights Act By Proceeding With Preliminary Steps In Filing And "Unfreezing" The Election Date Established By The Precleared Submission.....37

V. The Question of Whether Or Not Section 5 Requires a Showing of Racially Discriminatory Purpose Is Not Before This Court.....43

VI. The Abolishment of The Office of The Hampton County Superintendent of Education Has Been Precleared.....45

Appendix.....(1a)

TABLE OF AUTHORITIES

Cases: Page

Allen v. State Board of Elections, 393 U.S. 544.....11, 31, 34

Beer v. United States, 425 U.S. 130.....31, 32, 33

Berry v. Doles, 438 U.S. 190 (1978).....28

Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982).....33

City of Lockhart v. United States, __U.S. __, 74 L.Ed. 2d 863.....11

City of Richmond v. United States, 422 U.S. 358.....44

Connor v. Waller, 421 U.S. 656.....33

Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979).....26

Dougherty County v. White, 439 U.S. 32.....44

East Carroll Parish School Board v. Marshall, 424 U.S. 636.....11

Georgia v. United States, 411 U.S. 526 (1973).....26, 31, 33, 34, 44

Heggins v. City of Dallas, Tex., 469 F. Supp. 739 (N.D. Texas (1979).....26, 33

TABLE OF AUTHORITIES - Continued

Cases: Page

Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981).....25, 33

McCain v. Lybrand, __U.S. __, 79 L.Ed. 2d 271.....34, 41

Moore v. LeFlore Cty. Bd. of Election Comm'rs., 351 F. Supp. 848 (N.D. Miss. 1971).....25

Morris v. Gressette, 432 U.S. 491.....32, 34

Perkins v. Mathews, 400 U.S. 379.....31, 41

South Carolina v. Katzenbach, 383 U.S. 301.....30, 31

United States v. County Comm'n, Hale Cty, Ala., 425 F. Supp. 433 (S.D. 1976).....25

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978).....27, 32, 41

Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970).....26

Page

Statutes:

42 U.S.C. 1973(c)..... 25

Voting Rights Act, §2..... 7, 46

Voting Rights Act, §5..... Passim

Act 483, South Carolina Laws (1982)..... 21

Act 484, South Carolina Laws (1982)..... 21, 24

Act 547, South Carolina Laws (1982)..... Passim

Act 549, South Carolina Laws (1982)..... Passim

South Carolina Code of Laws, 1976, Section 7-11-210..... 20

U. S. Constitution:

Fourteenth Amendment..... 7, 46

Fifteenth Amendment..... 7, 46

No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(THREE-JUDGE COURT)

BRIEF FOR APPELLEES
Hampton County Election Commission,
Its Members, Hampton County Treasurer

QUESTIONS PRESENTED

1. Whether or not the scope of the Voting Rights Act includes prohibiting a covered jurisdiction from conducting the preliminary step of opening filing for county offices before the Act containing these filing dates is precleared when this filing will be null and void if the act is not precleared.

2. Whether or not the scope of the Voting Rights Act includes requiring a new election date to be precleared when the election date established by the precleared Act and which had been suspended from implementation while awaiting preclearance cannot be implemented because preclearance comes after the date set forth in the Act for the election.

STATEMENT OF THE CASE

Prior to 1982 Hampton County had an appointed six member County Board of Education. The County was also divided into two school districts which were each governed by a six-member Board of Trustees, each member being appointed by the County Board of Education.

On February 18, 1982, Act 547 was enacted by the South Carolina General Assembly. This Act provided that beginning with the general election in 1982, the Hampton County Board of Education would be composed of six members elected at large. On February 24, 1982, this Act was submitted to the Justice Depart-

ment for Voting Rights review and on April 28, 1982 the Justice Department entered no objection to the Act.

Following the enactment of Act 547, but before the Justice Department entered no objection to the Act, the General Assembly enacted a new law regarding the Hampton County education system, Act 549, which, when precleared by the Justice Department, would supersede Act 547. This Act provided for a referendum to be held to decide if the County wanted to abolish the County Board of Education and the Hampton County Superintendent of Education and have their duties devolve upon the trustees for School Districts One and Two who would be elected. This Act further reduced the number of Trustees in each district from six to five and required that filing for these offices be held between the dates of August

16-31, 1982. This referendum was held and approved by the electorate. Once all the information for the submission was compiled, the Act was submitted to the Justice Department for preclearance on June 22, 1983.

In order to comply with state law requirements which mandated filing to be held during the period of August 16-31 and federal law requirements that required Voting Rights Act review before an election could be held under either Act 547 or Act 549, the Hampton County Election Commission opened filing for offices for either election that might be held; i.e., the election of a County Board of Education pursuant to the provisions of Act 547, or the election of two Trustee Boards pursuant to the provisions of Act 549. The Justice Department did not respond until August

23, 1982, which was in the middle of the mandatory filing period for the offices provided for under the provisions of Act 549. On August 23, 1982, a letter was sent to the South Carolina Attorney General's Office stating that the Justice Department objected to Act 549. This letter was not received by the South Carolina Attorney General's Office until August 26, 1983. It was then forwarded by mail to the members of the General Assembly who had sponsored the bill. By August 31, 1983, a letter had been sent to the Justice Department formally requesting reconsideration of their objection. On November 19, 1983, the objection was withdrawn. By this time elections required by the only Act then approved by the Justice Department, Act 547, had been

required to be held. However, approval of Act 549 voided Act 547 as its provisions were superseded by Act 549.

On November 29, 1982, the Chairman of the Hampton County Election Commission wrote the South Carolina Attorney General's Office seeking guidance as to if an election should be held, when an election should be held, and if the filing that the Hampton County Election Commission had conducted during the time specified by the new precleared Act should be re-opened. (J.A. 74a). On January 4, 1983, a letter was issued by the South Carolina Attorney General's Office stating that an election should be held because the provisions of Act 549 (R398) were then in effect; that this election should be held as soon as possible; and, assuming that prospective candidates were aware of the filing period of August 16-

31, the filing dates would not have to be re-opened in that only the date of the election had changed. (J.A. 68a). The question of whether or not any of these steps would require preclearance was not at issue in this correspondence.

An election was held on March 15, 1983, for the offices provided for by Act 549. All of the elected members of the District Two Board of Trustees are black. One of the five elected members of the District One Board of Trustees elected is also black.

On March 11, 1983, this action was brought alleging violations of Section 5 and Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. On March 12, 1983, a Motion for a Temporary Restraining Order was filed by the appellants in this case. This Motion

was denied following a March 14, 1983 evidentiary hearing. On September 9, 1983 a three-judge court was convened and dismissed the complaint insofar as it sought to state a claim under Section 5 of the Voting Rights Act.

SUMMARY OF ARGUMENT

I

Hampton County did not attempt to implement an unprecleared change.

II

Pursuant to Act 549, which was subsequently precleared, filing must occur between August 16-31, 1982. There was no other authority providing a time for conducting filing other than these dates. Hampton County, therefore, conducted filing during this period as a preliminary step to an election that would only be held if the Justice Department precleared Act 549. Authorizing

preliminary steps of filing is not attempting to implement an unprecleared Act. It is a step to an election which will not be held if the Act is objected to. Further, assuming arguendo that filing should not have occurred prior to receiving preclearance from the Justice Department, once such approval was received it retroactively approved the filing which was a part of the precleared Act. Additionally, the Justice Department has not objected to filing as a preliminary step in the past.

III

The setting of a new election date was simply the "unfreezing" of an election delayed by virtue of submitting Act 549 to the Justice Department for preclearance under the Voting Rights Act. The setting of a date for an election that has

not been held due to preclearance not being received in time to hold the election when the Act mandated the election, does not require preclearance. The new date is not a change in South Carolina law but merely an attempt to enforce a law once precleared.

IV

The district court's discussion of whether or not a racially discriminatory purpose is a requirement of a Section 5 case is not properly before this Court.

V

The abolishment of the office of the Hampton County Superintendent of Education has been precleared.

ARGUMENT

I

Hampton County Did Not Attempt to Implement An Unprecleared Change.

At issue in this case is the scope [1] of the Voting Rights Act and the procedures that a covered jurisdiction may properly employ to implement and administer election laws while endeavoring to comply with the Voting Rights Act. Although this case concerns questions arising under the Voting Rights Act, it is a question of first impression and does not concern an issue specifically decided previously by this Court.

In Allen v. State Board of Elections, 393 U.S. 544, 569, the Court in the

---

[1] In Allen, the Court stated that it was being called upon

> ...to determine the applicability of a statute [the VRA] where the language of the statute does not make crystal clear its intended scope. Allen, supra, p. 20.

On at least two other occasions members of the Court have mentioned the scope of Section 5 as a consideration in the cases before the Court. See also, East Carroll Parish School Board v. Marshall, 424 U.S. 636, 640, (Burger, C.J., concurring); City of Lockhart v. United States, __ U.S. __, 74 L.Ed. 2d 863, 870.

context of discussing reapportionment

legislation stated that

> ...the question of whether §5 might cause problems in the implementation of legislation is not properly before us at this time... The argument that some administrative problem might arise in the future...we leave to another case... [for] consideration of any possible conflict.

This case does illustrate the difficulties States face in implementing legislation that is subject to the Voting Rights Act while also attempting to conduct elections that are not completely disruptive to the electorate and that comply with state requirements and laws that are not subject to Section 5 review. However, it is not a case where a covered jurisdiction attempted to circumvent the Voting Rights Act or to delay the implementation of an Act. This is a case where the covered jurisdiction rigorously attempted to comply with the regulations

of the Voting Rights Act.

In the present case, on February 18, 1982, Act 547 was enacted by the South Carolina General Assembly. (J.S. 17a). This Act provided that the formerly appointed six-member Hampton County Board of Education would now be elected at large and that the first election would be held in the November general election. This Act was submitted to the Justice Department and received preclearance.

Before the Justice Department entered no objection to Act 547, the General Assembly enacted a new law regarding the Hampton County Board of Education. This new legislation was Act 549 which, when precleared, would supersede the provisions of Act 547. (J.S. 19a). This Act abolished the Hampton County Board of Education and the Office of the Hamp-

ton County Superintendent of Education devolving their powers upon the formerly appointed Boards of Trustees of Hampton School Districts One and Two which would now be elected. This Act established a specific time period when filing for these offices would be accomplished and set the November general election as the date for the first election.

Act 549 was originally objected to by letter dated August 23, 1982, and was not finally precleared until after the November general election on November 19, 1982. When Act 549 was objected to, the County did not attempt to implement this Act but conducted an election under the Act first approved, Act 547.

Once the objection to Act 549 was withdrawn, the Hampton County Board of Education was placed in an untenable position. The County's schools were

being governed by a Board that was abolished by Act 549, Act 549 having come into full force and effect of law once it received preclearance. The Hampton County Board of Education had no further legal existence under State or Federal laws and, therefore, could not properly or legally operate the Hampton County School system. Likewise, State and Federal monies for the school system had to be allocated to some proper authority which had the legal ability to function and disburse these monies.

An election, therefore, had to be held quickly to elect the proper district boards that would assume the powers previously exercised by the County Board and could lawfully function. The problem then presented to the County was how to implement the provisions of the precleared Act, Act 549, which had re-

ceived preclearance later than the date anticipated by statute for the scheduled election.

Earlier when both Acts were being considered by the Justice Department, in a good faith effort to comply with whatever election would ultimately be held, the Hampton County Election Commission accepted filings for both offices. This action was necessitated by the facts in this case.

On August 16, 1983, the local officials in Hampton County had before them an Act that had been precleared by the Justice Department that required a formerly appointed County Board of Education to be elected. By the provisions of Act 547 filing for these offices had

to be accomplished no later than forty-five days before the November 2 general election. Therefore, sometime in mid-September would be the last day a person could file for this office. On the other hand, there existed another Act, Act 549, which abolished this very Board and required the previously appointed Boards of Trustees to be elected in a general election. The Act further mandated filing for these offices to occur during the designated dates of August 16-31, 1982. This Act had been submitted to the Justice Department in June but no action had at that date been taken on the submission.

By newspaper articles and by communications with each person coming to file for office, the Hampton County Election Commission informed persons

they should file for both elections because it was not clear which office would be precleared by the Justice Department. (Appellees Hampton County Election Commission Motion to Dismiss or Affirm, App. 3a-10a). As the court noted in its Order, if filing had not been opened during this time period and

> [i]f Act 549 was precleared, pursuant to State law, it would supersede Act No. 547. But if preclearance came after August 31, Trustee elections could not be held as scheduled, because no candidate would have qualified by filing during the specified statutory filing period. (J.S. 4a-5a)

Proceeding with the preliminary step of filing did not constitute enforcement of an unprecleared change. Further, the County did not conduct an election prior to receiving preclearance of the submitted Acts.

II

Hampton County Can Proceed With The Preliminary Step of Filing Under An Act That Is Awaiting Preclearance.

A. Allowing filing for an office does not constitute an improper enforcement of an election law while awaiting its preclearance.

Allowing filing for an office is simply a preliminary step to an election that in this case was subsequently approved. If the Act had been disapproved, the filing would have been null and void. However, the Act was approved and, therefore, the filing was properly opened during the dates specified by the Act and those dates only.

The United States in its brief states that the Justice Department has "...consistently construed...[Section 5] ...as applying to the types of changes in voting practices and procedures that are

involved in this case." Brief of United States, pp. 8, 13-15. But, to the contrary, the covered jurisdiction had reason to believe that this procedure was proper and that the Justice Department deemed it proper. In this same year, 1982, the counties in South Carolina were being reapportioned following the release of the 1980 census figures for general elections to be held in 1982. Due to a conflict over whether the General Assembly or the counties had the authority to reapportion the counties, many of the counties had not yet drawn their reapportionment plans as of March 1, 1982. By statute, filing for county offices was to end at twelve o'clock noon on March thirtieth. South Carolina Code of Laws, 1976, Section 7-11-210, as amended. As reapportionment had not even been accomplished in several

counties, the statutory filing period could obviously not be met for these county offices. Therefore, on March 22, 1982, the General Assembly enacted Act 483 to delay the filing date of candidates for county councils which had not yet received preclearance to a "...time period to be determined by the General Assembly." (App. A) The General Assembly stated in Act 483 that it found this enactment necessary in that

> ...implementation of redistricting plans for...certain county council ...offices had been unavoidably delayed beyond the beginning of the filing periods established for party primary....

Subsequently, on April 22, 1982, the General Assembly enacted legislation which established the time period for filing previously left open-ended by Act 483. Act 484, bearing ratification number 413 (J.A. 55a), amended the filing period

for county offices for this one year to a specific date of April 23 to May 7, 1982. Subsection B of Section 1 of this Act provided as follows:

> [t]he filing period for candidates seeking nomination to any district within a county which has been or is being reapportioned and as of March 1, 1982, has not received preclearance pursuant to the provisions of Section 5 of the 1965 Voting Rights Act (42 USCA Sections 1973 et seq.) shall begin at noon on April 23, 1982, and shall close at noon on May 7, 1982.

This Act, as stated, was enacted on April 22 for filing to begin on April 23. The Justice Department stated in their letter they received the submission on April 27. Following a request for expeditious consideration, the Justice Department entered no objection to the Act on June 2. (J.A. 53a). The Justice Department, therefore, approved an Act regarding filing dates they received

after the date filing began and after the date filing had already closed. No where in the letter is it stated that they approved the Act but now new filing dates would have to be set because filing had occurred before the Act had been officially precleared. Indeed, the entire Act only concerned setting filing dates so nothing else could possibly be construed as being precleared. And as the dates were clear on the face of the submission, the Justice Department had to be aware that the filing had occurred before preclearance. They did not object to this procedure. Additionally, several counties' reapportionment plans were precleared in the middle of or following the close of this filing period. (J.A. 50a, 56a, 57a).

Having received preclearance of

Act 484 in June of 1982 just five months before the Justice Department precleared Act 549 and its statutory filing dates, the covered jurisdiction was justified in believing that the filing that occurred during the dates provided by Act 549 was proper and should not be re-opened. 2/

B. The Initiation Of Preliminary Steps As Well As The Enforcement of Actual Changes Prior To Preclearance Has Been Permitted By The Justice Department And The Courts.

The Justice Department has even taken the position in Court that merely

---

2/ This is further supported by the fact much publicity was given to these filing dates and all candidates were advised to file for both offices - the offices established under Act 547 and the offices established under Act 549. (Appellees Hampton County Election Commission Motion to Dismiss or Affirm, App. 4a-5a, 7a-9a). Surely it cannot be argued that this procedure was a procedure utilized to minimize black candidates in that the record shows that six blacks and four whites were elected to office. Further, there was, of course, also the option of a write-in candidacy for anyone who failed to file during the statutory time period.

preliminary steps to an election should be continued pending preclearance of a submitted change. In Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.C. NY 1981) at footnote 11 the court notes that the United States Attorney General as amicus curiae had "...urged that... [the court] deny an injunction against the holding of the primary election on September 10, in hopes that preclearance by the Attorney General will be forthcoming prior to the general election of November 3." 3/

3/ In the instant case the Appellants are alleging that the Appellees improperly allowed preliminary filing procedures before preclearance and that this should be found to violate 42 U.S.C. 1973(c). However, there have been many cases in which the courts have found that a questioned change was one that should have been precleared and yet even in the face of this finding authorized an election to proceed. United States v. County Comm'n, Hale Cty, Ala, 425 F. Supp. 433 (S.D. Ala. 1976), judg't aff'd, 430 U.S. 924 (1977); Moore v. LeFlore Cty. Bd. of Election Comm'rs,

The Justice Department has also been on record as retroactively approving actual changes that have already been implemented. In Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979), a suit was brought contesting the validity of registration of voters because the registration was conducted pursuant to laws that were implemented eight months before they were submitted to the United States Department of Justice for preclearance. The Court held that since the Jus-

---

351 F. Supp. 848 (N.D. Miss. 1971); Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970). See also Georgia v. United States, 411 U.S. 526 (1973). As stated in the dissent of Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 745-746 (N.D. Texas 1979):

> [a] reading of the cases reveals that enjoining an election for an indefinite time until preclearance is obtained is the exceptional remedy rather than the normal one. [cites omitted.]

tice Department had subsequently approved the changes and was aware of the fact registration had already occurred under the new laws, the city had satisfied the preclearance requirements of Section 5. Additionally, in United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978), the Town of Sheffield wrote the Justice Department that they wanted to hold a referendum on whether or not the form of government should be changed. The referendum was held before the Justice Department responded. The Attorney General stated in his subsequent letter that he did not object to the referendum, that he was aware the referendum had been held and that since the voters had approved the change, the change authorized by the referendum would have to be submitted for preclearance.

In the case of Berry v. Doles, 438 U.S. 190 (1978), this Court upheld a three-judge Court that had allowed an election to stand even though the change had not received preclearance. The Court found that the change should, however, be submitted and "[i]f approval is obtained, the matter will be at an end." Berry, supra at 193.

The Appellees would submit that this same principle of retroactive approval that has been applied to actual changes is applicable in the instant case in regard to approving preliminary steps of filing that were at least precleared when the Act itself was precleared. 4/

4/ The appellants allege that filing was ineffective from August 23, 1982, when the Justice Department entered their original objection to Act 549. Appellees would assert that the letter of objection was not

If the local officials had suddenly, without authority, re-opened filing that would have been a change requiring pre-clearance. To have re-opened filing would also have affected the rights of those candidates who had filed during the statutory time limits established by the precleared Act.

Act 549 authorized the County to open filing and close filing at certain specific dates. When the Justice Depart-

---

received by the South Carolina Attorney General's Office until August 26, 1982, and was then forwarded by mail to the Representative who introduced the bill. On August 31, the last day of the filing period, a letter was sent officially requesting reconsideration of the objection. The request for reconsideration kept open the possibility that Act 549 might eventually be approved thereby necessitating the continuation of filing. Additionally, the Chairman of the Hampton County Electin Commission has testified that he never received official notification that Act 549 had been objected to. (App. 9a-10a).

ment precleared Act 549, they also precleared the provision in the Act that required filing to be held August 16-31, 1982.

III

When Preclearance is Received After Time of Election Specified in The Act, Holding The Election At a Time Subsequent Constitutes An "Unfreezing" of The Election Process And Not An Improper Enforcement of The Precleared Submission.

Appellants further allege that preclearance should have been obtained prior to the change of the date of the elections provided for in Act 549 from November, 1982 to a subsequent time.

The Court has variously interpreted Section 5 review of election changes as having the effect of "suspending", "freezing", "delaying", or "postponing" the enforcement of the Act. In the first test case of the constitutionality of the Voting Rights Act, South Carolina

v. Katzenbach, 383 U.S. 301, 315-316, the Court stated that

> Section 5 prescribes a...remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetrate voting discrimination. (Emphasis added.)

See also South Carolina v. Katzenbach, supra, p. 334. This same language of a submitted Act being "suspended" was also used in Allen v. Board of Elections, 393 U.S. 544, 562; Perkins v. Matthews, 400 U.S. 379, 406 (Black, J., dissenting); Beer v. United States, 425 U.S. 130, 148, n. 3 (Marshall, J., dissenting). In Georgia v. United States, 411 U.S. 526, the Supreme Court stated that:

> ...it is important to focus on the entire scheme of §5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without

> discriminatory purpose or effect. The alternative procedure of submission to the Attorney General 'merely gives the governed State a rapid method of rendering a new State election law enforceable.' [Cite omitted.] (Emphasis added.) Georgia, supra, 411 U.S. at 538.

See also Beer v. United States, 425 U.S. 130, 140 quoting from H. R. Regs. No. 94-196, pp. 57-58; and page 152, n. 9 (Marshall, J., dissenting); United States v. Sheffield Board of Commissioners, 435 U.S. 110, 121.

In Morris v. Gressette, 432 U.S. 491, 501 the Court stated that

> Section 5 requires covered jurisdictions to delay implementation of validly enacted state legislation until federal authorities have had an opportunity to determine whether that legislation conforms to the Constitution and to the provisions of the Voting Rights Act. (Emphasis added.)

In Morris v. Gressette, supra, at 504, the Court further stated that Section 5

"postponed" the implementation of state legislation.

The courts have also held that pending Section 5 preclearance, any future elections are enjoined unless and until the State receives Section 5 preclearance. Georgia, supra, at 541; Connor v. Waller, 421 U.S. 656, 657 (Marshall, J., conc. op. quoting Georgia, supra); Beer v. United States, supra, at 140; Herron, supra, at 175-176; Heggins v. City of Dallas, Tex., supra, at 743. In Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982), a court with equal authority with the Justice Department to preclear Section 5 submissions, stated that until preclearance was received on a congressional redistricting plan the election would be postponed "...until the earliest practicable date."

There is further language that Justice Department review of Section 5 submissions was to be an "expeditious alternative", Morris, supra, at 504; a "rapid method of rendering a new law enforceable." Allen, supra, at 549; Georgia, supra, at 538; or a "speedy alternative", Morris, supra, at 503; McCain v. Lybrand, ___ U.S. ___, 79 L.Ed. 2d 271, 280.

As stated in Georgia, supra, the purpose of providing an alternative procedure of submitting a change to the Justice Department was to provide for a rapid way of making a law enforceable. As many changes submitted for preclearance involve election dates, it would seem inconceivable that the Act envisioned that every submission "freezing" an election date until approval by the Justice Department and which was not

precleared until after the election date established by the Act, would require the General Assembly of the State to enact a new law establishing a new election date and submit it all over again for approval. This procedure could continue on ad infinitum if each approval would come after the date established by the law for the election. This procedure in itself would be a way of circumventing the Voting Rights Act and avoiding perhaps unpopular elections. In this case, the Justice Department did not remove their objection until November 19, 1982. Under Appellant's rationale an election could not be held until the General Assembly reconvened in January, enacted new legislation establishing a new election date for Hampton County, ratified the Act, and submitted it to the Justice Department for approval. If this

procedure were followed for every Act that established election dates, the elections would be held years out of time with the present office holders holding over years past their term of office.

As the District Court held:

> [i]t is not questioned that Act No. 549 constituted a Section 5 'change' that required preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not 'changes' contemplated by Section 5, and thus did not require preclearance. (J.S. 9a)

IV

Hampton County Was Operating Within The Scope of The Voting Rights Act By Proceeding With Preliminary Steps In Filing And "Unfreezing" The Election Date Established By The Precleared Submission.

The United States alleges that "advance preclearance of future, unspecified changes...is contrary to the basic concept of Section 5." Brief For the United States as Amicus Curiae, p. 13. However, these are not unspecified changes, the filing dates were submitted and precleared by the Justice Department and the election date was merely held at a postponed date following preclearance of the submitted Act.

Further, this case does not represent an altering of the scope and effectiveness of §5. There is no departure from the mandates of the Voting Rights Act, the decisions of this Court or the

interpretations of the Justice Department in that the filing dates were submitted and precleared and the election date simply "unfrozen." Nor is this a case of a covered jurisdiction trying to implement an illegal change in the hopes it will be retroactively approved. Brief For Appellants, p. 43. Trying to comply with preliminary steps that will never be finally implemented by the conduct of an election if the Act is not precleared is not by any stretch an attempt to "illegally implement a change" as is proven by this very case in that an election was not held under Act 549 when it did not receive preclearance in time to be held in the November general election.

If the Justice Department instead of originally objecting to Act 549 on August 23 had precleared the Act, and the

County had not initiated the preliminary steps of opening filing on August 16 as required by Act 549, the County would have been unable to enforce the law as precleared. If after receiving preclearance, the filing period had been shortened to the date the letter of preclearance was received and to the end of the time prescribed for filing by the Act, the result would have been an abbreviated filing schedule of August 26-31, resulting in substantially less time to file than originally envisioned by the Act. Further, it would not have been feasible to alert people of these dates in sufficient time for them to have known to file.

If, therefore, all new filing dates had to be set and preclearance was required, the date would have been required to be set far enough in the

future to allow a minimum of sixty-day review by the Justice Department. Therefore, a filing date could not have been set <u>to begin</u> prior to October 26. [5/] If the original fifteen days for filing was provided, filing would have to continue past the November election which would, of course, then also require the date of the election to be altered even though a November election was originally precleared. A special election would therefore have to be held with the possibility of a lower voter turnout. (Brief For Appellants, p. 23). This special election would be necessi-

---

5/ This assumes a new date was set on the very date preclearance was received by the South Carolina Attorney General's Office which would, of course, be before the locality received official notification of the letter from the Justice Department.

tated by no other reason than that the preliminary step of filing had not been able to be accomplished.

The hypothetical argument is not made in an attempt to justify a non-compliance with the Voting Rights Act due to practical or administrative problems in holding elections while complying with provisions of the Voting Rights Act. 6/ As repeatedly previously stated, there has been compliance with the Voting Rights Act. Filing occurred when state law required filing, an action that would have been null and void if the Act was objected to as the county proved by its originally not holding the election

---

6/ Indeed South Carolina has always been rigorous in making submissions. Perkins v. Matthews, 400 U.S. 379, 393 n. 11; McCain v. Lybrand, __ U.S.__, 79 L.Ed. 2d 271, 284, n. 23.

in light of the objection from the Justice Department; further, the filing was precleared; additionally, the State had that year had a similar act regarding filing approved after the date of the filing had passed and, therefore, had reason to believe this filing would be treated in the same manner; and the election date was simply an unfreezing of the delayed election to a new date.

At some point the State has to be able to implement a proposed change. At some point federal law requirements and state law requirements must co-exist with obvious pre-emence to the federal Voting Rights Act requirements. At some point there must be deemed to have been compliance with the Votirg Rights Act. If the State attemp' t. be in a position to conduct its elec-

tions by allowing a preliminary step of filing for office for an election that will not be conducted if the Justice Department objects to the Act; and if the State holds the election as quickly as feasible following preclearance of an Act, it would appear that the mandate of the Act has been met.

V

The Question of Whether Or Not Section 5 Requires a Showing of Racially Discriminatory Purpose Is Not Before This Court.

Appellants raise the argument of whether or not the district court correctly found that a racially discriminatory purpose or effect was a requirement of a Section 5 case. (J.S. 15). The Court discussed this only in passing and in connection with whether or not an alleged failure of the election commissioner to certify the results of the

referendum was a change that should have been precleared. (J.S. 8a). The Appellants have conceded now in their brief, that the results were certified to the Code Commissioner. (J.S. 6, n. 2, Brief of Appellants, p. 12, n. 2). Therefore, having abandoned this part of their appeal, we would submit that Appellants lack standing to now brief the question of whether or not the District Court was correct in its reasoning of this aspect of the case.

However, the Appellees would assert that the District Court's statement finds support in the language found in the following cases: City of Richmond v. United States, 422 U.S. 358, 378; Georgia v. United States, 411 U.S. 526, 534; Dougherty County, Ga. Bd. of Ed. v. White, 439 U.S. 32, 42.

VI

The Abolishment of The Office of The Hampton County Superintendent of Education Has Been Precleared.

As to Appellants' argument regarding the Office of Superintendent of Education and their allegation that the Superintendent's Office has been abolished without preclearance, the abolition of this Office was a part of Act 549 and was approved when Act 549 was approved. The United States in its brief agrees that this part of Act 549 was precleared. (Brief For United States, pp. 15-16, n. 1).

This finding was the extent of the District Court's determination as to this allegation. (J.S. 10a-11a). Any further questions regarding whether or not his duties have been affected have not been proven at this stage of the litigation

but may be litigated in the Section 2, Fourteenth and Fifteenth Amendment part of this case which is still pending.

CONCLUSION

For all the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant Attorney General

J. EMORY SMITH, JR.
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR HAMPTON COUNTY ELECTION COMMISSION
Murdaugh, Sinclair, Wooten, Smith; Hampton County Treasurer, Wilson P. Tuten, Jr.

APPENDIX

Expenditures not to exceed certain amount

SECTION 1. (A) The Department of Social Services shall assure that for the period of October 1, 1981, through September 30, 1982, the federal financial participation drawn for the Medicaid expenditures shall not exceed the $217,548,983.00 break-even point or the authorized amounts in the general appropriations act, whichever is less, in order to receive the three percent rebate for the funds withheld.

(B) The State Treasurer shall determine any temporary excess in any debt service account and may lend such monies, on a short term interest bearing note, to the Department of Social Services, the Department of Mental Health and the Department of Mental Retardation, in an amount not to exceed those Medicaid funds which are temporarily retained by the federal government.

(C) The Treasurer shall determine an appropriate interest rate which shall be charged on the entire amount advanced to each of the agencies.

(D) As soon as practicable after July 1, 1982, any of the agencies receiving advances as provided herein shall pay from its 1982-83 appropriation the principal and interest due on the outstanding loan.

(E) The Budget and Control Board shall have the authority to promulgate regulations necessary to implement the provisions of this resolution.

Time effective

SECTION 2. This act shall take effect upon approval by the Governor.

Approved the 25th day of May, 1982.

(R366, S875) **No. 483**

A Joint Resolution Delaying The Filing Period For Candidates For The House Of Representatives And Certain School District Offices And County Council Offices During The Calendar Year 1982.

Whereas, the General Assembly finds that implementation of redistricting plans for the House of Representatives and certain county council and school district offices within counties have been unavoid-

BEST AVAILABLE COPY

ably delayed beyond the beginning of the filing periods established for a party primary; and

Whereas, the General Assembly finds it necessary to delay the filing periods to allow adequate time for the adoption of new redistricting plans and proper notice to all candidates of the new district lines; and

Whereas, the General Assembly finds that, in order to avoid as much confusion as possible, the filing periods for all offices not affected by the delay in implementing new redistricting plans should not be disrupted. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Filing period for candidates delayed

SECTION 1. A. Notwithstanding any other provision of law, the provisions of this Joint Resolution shall be applicable during the calendar year 1982 only.

3. The filing period for the office of a member of the House of Representatives shall be opened for the entries of those candidates wishing to offer for such nomination in the party primary at noon on April first and shall close at noon on April fifteenth. The filing period for candidates seeking nomination to any district within a county which has been or is being reapportioned and has not yet received preclearance pursuant to the provisions of Section 5 of the 1976 Voting Rights Act (42 USCA Sections 1973 et seq., shall be delayed to a time period to be determined by the General Assembly.

C. The filing period for the nomination of candidates for all other offices in a party primary shall be held as provided for by law.

Time effective

SECTION 2. This act shall take effect upon approval by the Governor.

Approved the 22nd day of March, 1982.

(R413, S946) **No. 484**

A Joint Resolution To Delay For 1982 Only The Filing Period From Noon, March 16th, To Noon, March 30th, Until Noon, April 23rd, To Noon, May 7th, For Candidates Seeking Nomination To

BEST AVAILABLE COPY

Office-Supreme Court, U.S.
FILED
SEP 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

National Association for the Advancement of Colored People, et al.,

Appellants,

vs.

Hampton County Election Commission, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF APPELLEES HAMPTON COUNTY SCHOOL DISTRICT NO. 1, STANLEY, BROOKER, HUTTO, FREEMAN AND ULMER and HAMPTON COUNTY SCHOOL DISTRICT NO. 2, DIXON, ORR, JOHNSON, GORDON AND MANIGO

SINKLER GIBBS & SIMONS
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

ATTORNEY for Appellees
Hampton County School
District No. 1 and
its Trustees

Bruce E. Davis*
Post Office Box 881
Camden, SC 29020
(803) 432-2880

ATTORNEY for Appellees
Hampton County School
District No. 2 and
its Trustees

*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether or not the district court was correct in holding that the preclearance of legislation effecting a change in voting within the meaning of Section 5 of the Voting Rights Act of 1965 effectively preclears preliminary implementation done in accordance with the legislation prior to preclearance.

II. Whether or not the district court was correct in holding that the preclearance of legislation effecting a change in voting within the meaning of Section 5 of the Voting Rights Act of 1965 renders the legislation immediately enforceable.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	12
ARGUMENT:	
I. The district court was correct in holding that the preclearance of Act No. 549 effectively precleared the preliminary implementation done pursuant to its provisions prior to preclearance.....	13
A. Opening of statutorily prescribed filing period...	13
B. Certification of referendum results to South Carolina Code Commissioner.....	18
C. Abolishment of office of Hampton County Superintendent of Education and devolution of his duties on elected boards of trustees.....	21
II. The district court was correct in holding that the preclearance of Act No. 549 rendered the statute immediately enforceable without requiring the additional preclearance of implementing action taken solely because of the timing of the preclearance.....	22
CONCLUSION.....	30

TABLE OF AUTHORITIES

CASES:	Page
Allen v. State Board of Elections, 393 U.S. 544 (1969).....	19, 27, 28, 29
Berry v. Doles, 438 U.S. 190 (1978).	15, 16, 23
Charlton County Board of Education v. United States, 459 F. Supp. 530 (D.D.C. 1978).....	11
Dougherty County Board of Education v. White, 439 U.S. 32 (1978)...	19
Georgia v. United States, 411 U.S. 526 (1973).....	19
Morris v. Gressette, 432 U.S. 491 (1977).....	27, 28, 29
Perkins v. Matthews, 400 U.S. 379 (1971).....	20
United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110 (1978).....	23
United States v. Georgia, C.A. No. C76-1531A (N.D. Ga. 1977), aff'd 436 U.S. 941 (1978).....	19
STATUTORY PROVISIONS:	
South Carolina statutes at large	
Act No. 547 of 1982 [62 STAT. 3495 (1982)].....	3, 6, 9, 15
Act No. 549 of 1982 [62 STAT. 3497 (1982)].....	passim

Page

United States Code

42 § 1973 c [§ 5, 1965 Voting Rights Act]..... passim

MISCELLANEOUS:

28 C.F.R. § 51.19..... 6

28 C.F.R. § 51.44..... 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

National Association for the Advancement of Colored People, et al.,

Appellants,

vs.

Hampton County Election Commission, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLEES' BRIEF ON THE MERITS

STATEMENT OF THE CASE

This appeal is from the order of the three-judge district court dated September 9, 1983, holding that the provisions of Act No. 549 of the 1982 South Carolina General Assembly have not been put into effect in violation of Section 5 of the Voting Rights Act of 1965 and denying the appellants'

request for injunctive relief. J. S. App. beginning at 1a. [1]

Prior to November 1, 1964, and until the enactment of the 1982 legislation whose implementation is challenged by the appellants, the public school system of Hampton County was governed by the Hampton County Board of Education ("County Board"), the Hampton County Superintendent of Education ("Superintendent") and the boards of trustees of Hampton County School Districts Nos. 1 and 2 ("Boards of Trustees"). [2] The County Board was composed of six members and was appointed by the Hampton County members of the

---

[1] This Brief is filed on behalf of the appellees Hampton County School District No. 1 and its Trustees, Philip Stanley, Lenon Brooker, Jerlyn Hutto, Miles Freeman and Gerald Ulmer and Hampton County School district No. 2 and its Trustees, T. M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon and Lee Manigo ("these appellees").

[2] Approximately 68% of Hampton County's public schoc students are black; District No. 1 students are 54% black and 46% white and District No. 2 students are 92% black and 8% white. J.A. 9a.

South Carolina Senate and the South Carolina House of Representatives. The County Board in turn appointed the six members of each of the two Boards of Trustees. The Superintendent was elected at large by the qualified voters of Hampton County and served as an advisor to the teachers and trustees of each district. Each school district operated separately under the general supervision of district superintendents. J.S. App. 2a.

Then, on February 18, 1982, the South Carolina General Assembly passed Act No. 547 of 1982, which changed the method of selection and the composition of the County Board. It provided for an elected County Board of six members elected at large from Hampton County beginning with the 1982 general election. J.S. App. 17a. The Superintendent, while continuing to be elected at large, was to serve as an ex officio County Board member with all rights and privileges of other members, including the right to vote. J.S. App. 18a. Act No. 547 did not affect the

composition or functioning of the two Boards of Trustees. The legislation was submitted by the South Carolina Attorney General to the United States Attorney General who precleared it under Section 5 of the Voting Rights Act on April 28, 1982. J.S. App. 3a.

Before Act No. 547 was approved, however, it was superseded by another piece of legislation, Act No. 549, [3/] which abolished the County Board as of June 30, 1983, and abolished the office of the Superintendent as of June 30, 1985. J.S. App. 19a. Once abolished, their respective duties were to be assumed and separately performed by the two Boards of Trustees. Beginning with the November, 1982, general election the Boards of Trustees were to be elected at large by a plurality vote of the electors within each

---

3/ The appellants' assertions in their Statement [Brief for Appellants] as to the reasons for the enactment of Act No. 549 were originally made in their complaint. J.A. 11a. They have been denied by these appellees [Id. 36a] and do not constitute facts in this appeal.

respective district. The number of members of each board was changed from six to five. Act No. 549 provided that a candidate offering for election in November, 1982, had to file with the Hampton County Election Commission during the period August 16-31, 1982. It included no language giving local election officials the authority to open a filing period other than the one specified. Id.

The changes to be effected by Act No. 549 were contingent upon approval by a majority of the qualified electors voting in a county-wide referendum in May, 1982. The referendum was conducted on May 25, 1982, and a majority of the voters approved Act No. 549. 4/ According to the mandate of the voters of Hampton County, then, the County Board and the office of Superintendent were to

---

4/ Over 46% of the registered voters in Hampton County voted in the referendum, which carried by a 55% affirmative vote. Docket Sheet entry No. 1 (Compl. Exhibit 9a).

cease to exist on June 30, 1982, and June 30, 1985, respectively.

As required by Section 5 of the Voting Rights Act, Act No. 549 was submitted to the United States Attorney General for preclearance on June 16, 1982. [5/] J.S. App. 4a. As stated earlier, Act No. 547 had already been precleared by the Attorney General and Act No. 549 likewise had to receive preclearance in order to be effective. The Attorney General's failure to preclear Act No. 549 would have rendered it unenforceable and would have revived the provisions of Act No. 547. On the other hand, if the Attorney General precleared Act No. 549, it would be the controlling piece of legislation. Because

---

5/ The appellants characterize the local officials' action in submitting the referendum results as evidencing deliberate delay. Brief for Appellants 7-8. Although the Department of Justice regulations authorize consideration of a preclearance request prior to the holding of an approving referendum, there are also sound reasons as well as authority for not making a submission of referendum results until "after [the changes] become final." 28 C.F.R. §51.19.

the Attorney General is authorized to take as long as 120 days from the date of submission to perform his Section 5 review, there existed the possibility that the filing period for candidates for the two Boards of Trustees, August 16-31, 1982, might pass long before the Attorney General precleared Act No. 549. But if preclearance came after August 31, 1982, the first election for the Boards of Trustees could not be held as scheduled because no candidate would have qualified by filing during the specified filing period. J.S. App. 4a-5a.

To avoid this situation, the appellee Hampton County Election Commission ("appellee Election Commission") began accepting filings on August 16, 1982, in accordance with Act No. 549. Id. On August 23, 1982, a full 60 days after Act No. 549 was submitted, the Attorney General objected to a portion of Act No. 549. J.A. 58a. Regarding the change in the method of selection from appointed to elected boards of trustees, the

Attorney General found neither a discriminatory purpose nor effect. J.A. 59a. But the Attorney General was unable to conclude that the abolishment of the County Board was not discriminatory toward Hampton County blacks. Id. The Attorney General noted, however, in his objection letter that the "[p]rocedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection."

Because the Attorney General's objection was received in the middle of the filing period and because a decision regarding whether or not to request reconsideration was pending, the appellee Election Commission continued to accept filings until the end of the statutorily prescribed period. Hampton County submitted a request for reconsideration on August 31, 1982. J.A. 63a. Nevertheless, because the possibility existed that the request for reconsideration would be denied, the appellee Election Commission also began

accepting filings for the elected County Board under Act No. 547. Any candidate who filed for one of the two Boards of Trustees was not precluded from also filing for the County Board. J.S. App. 5a. As of November 2, 1982, the Attorney General had not responded to the request for reconsideration and, accordingly, the appellee Election Commission held the County Board election on that date. Id.

Shortly thereafter, on November 19, 1982, the Attorney General withdrew his objection to the abolishment of the County Board because "a reappraisal of South Carolina law establish[ed] that the county board lacks authority to effect a consolidation and its abolition ... will not have the potentially discriminatory impact we had initially perceived." J.A. 65a. Despite the fact that the election for the County Board had already been held pursuant to Act No. 547, that legislation became a nullity when the Attorney General precleared Act No. 549.

Thereafter, the appellee Election

Commission prepared to implement Act No. 549. It sought the advice of the South Carolina Attorney General as to whether or not an election should be held for the two Boards of Trustees and, if so, the date of the election. It also sought advice as to whether or not the filing for the two Boards of Trustees should be re-opened. J.A. 74a.

The South Carolina Attorney General concluded that "the provisions of Act [No. 549] are now in effect and it requires that an election be held for the school trustees," that it should be held "[a]s soon as possible" and, finally, regarding the question as to whether the filing period should be re-opened, he concluded that "there is no reason to reopen filing as only the date of the election has changed." J.A. 67a. Acting upon this legal advice, the appellee Election Commission published a Notice of Election

setting March 15, 1983, [6] as the date for the election. J.S. App. 7a. The five members of each of the two Boards of Trustees, namely, these appellees, were elected on that date. One of the members of the District No. 1 Board of Trustees is black and all five members of the District No. 2 Board of Trustees are black. Id. n. 2.

---

[6] Although the Notice began appearing in January, 1983, the appellants waited until Friday, March 11, 1983, four days before the scheduled election, to file their complaint and motion seeking to preliminarily enjoin it. Docket Sheet Entry No. 2. Notwithstanding the appellants' characterization of the single judge's "premise" for denying preliminary injunctive relief [Brief for Appellants 13], the single judge cited the appellants' eleventh-hour application as a primary reason for denying it. Record Vol. II (Transcript of March 14, 1983 hearing 2-5). Cf., Charlton County Board of Education v. United States, 459 F. Supp. 530, 533, 536 (D.D.C. 1978).

SUMMARY OF ARGUMENT

The lower court correctly held that the preclearance of Act No. 549 effectively precleared the preliminary implementation done pursuant to its provisions prior to preclearance, including the opening of the statutorily prescribed filing period and the certification of the referendum results to the South Carolina Code Commissioner.

The lower court also correctly held that the preclearance of Act No. 549 rendered the statute immediately enforceable without requiring the additional preclearance of the implementing action, namely, the holding of a special election as soon as possible after preclearance notwithstanding Act No. 549 specified the general election, when Act No. 549 was not precleared until after the general election.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE PRECLEARANCE OF ACT NO. 549 EFFECTIVELY PRECLEARED THE PRELIMINARY IMPLEMENTATION DONE PURSUANT TO ITS PROVISIONS PRIOR TO PRECLEARANCE.

A. Opening of statutorily prescribed filing period pending preclearance.

The lower court upheld the opening of the statutorily prescribed filing period, August 16-31, 1982, notwithstanding Section 5 preclearance was then pending. It first found that the action was not a "change" but merely a ministerial or administrative decision necessary to accomplish the purpose of Act No. 549. J.S. App. 8a-9a. In this respect, it is similar to running the public notices of the election or printing the ballots, both of which were necessary actions to bring about the change effected by the statute, i.e., elected rather than appointed boards of trustees, but neither of which is itself a change. The preclearance requirement of Section 5 does not apply to every task performed by local officials in order to

execute Act No. 549 for, if that were true, the notices could not have been published nor the ballots circulated unless and until precleared.

The statutorily prescribed filing period began before completion of the Attorney General's Section 5 review. The decision to accept filings was an appropriate exercise of administrative discretion aimed at complying with both the Voting Rights Act and state law. The local officials were attempting to prevent the disruption of Hampton County's educational system and to avoid the expense and confusion of a special election. Inasmuch as Act No. 549 had been submitted to the Attorney General in June, it was not unreasonable to anticipate (and prepare for) its preclearance in time for the November, 1982, general election. Opening the filing period in August as the legislation directed enabled the election to be held in November, 1982, assuming preclearance by then. This good faith attempt to comply with both federal and state law is further evidenced by

the fact that, although filings were allowed for the Boards of Trustees pursuant to Act No. 549, they were also accepted for the County Board pursuant to Act No. 547. J.S. App. 17a. Candidates were permitted to file for either or both offices [7/] with the expectation that the matter would be resolved by November and that Hampton County voters would then be able to elect candidates to fill whichever governing body was the functioning one.

The lower court further found that, even assuming the opening of the August filing period was a Section 5 "change", it was precleared when the Attorney General withdrew his outstanding objection to Act No.549 in late November, 1982. Relying on Berry v. Doles, 438 U.S. 190 (1978), the lower court

---

7/ The appellee Election Commission so advised prospective candidates publicly through notices in the local newspaper and personally when candidates filed at the Commission office. Motion to Dismiss or Affirm (appellee Election Commission) App. 4a - 5a, 7a - 9a.

concluded that the "fact that the eventual preclearance of Act No. 549 followed the filing period for the Trustees' position is not a bar under Section 5." J.S. App. 9a. Act No. 549 has now been precleared by the Attorney General and thus has been found not to have a discriminatory purpose or effect. "[T]he matter [is] at an end." Berry v. Doles, 438 U.S. at 193. Assuming arguendo that the opening of the August filing period before preclearance was technically a violation of Section 5, no Section 5 claim exists now. An injunction against implementation of an unprecleared change is the only remedy for a violation of Section 5 and that remedy is no longer available because the alleged change has been precleared. The appellants' complaint regarding the local officials' decision to complete the filing period after receipt of the Attorney General's objection on August 26, 1982, is likewise moot

because that objection was subsequently withdrawn. [8]

The Solicitor General asserts that the Justice Department has uniformly treated candidate qualifying periods as covered by the preclearance requirement of Section 5. Brief for the United States as Amicus Curiae 15, n. 9. While these appellees have no quarrel with that assertion, it does not go far enough because it does not also disclose that the Justice Department, at the same time that it has viewed a new candidate qualifying period as a covered change, has allowed the new candidate qualifying period to proceed as statutorily provided pending preclearance. As the appellee Election Commission more fully explains [Brief for Appellees (Election Commission) 20-24], the Justice Department had

---

[8] Moreover, as the record manifests, the appellee Election Commission, which is the public body authorized to allow or disallow filing, most probably did not learn of the objection until after the statutory filing period had expired. Motion to Dismiss or Affirm (appellee Election Commission) App. 9a - 10a.

allowed a special filing period to go into effect pending preclearance [J.A. 50a - 51a, 53a - 57a] only six months before the appellee Election Commission was advised by the South Carolina Attorney General that he "assume[d] that pursuant to the Act's provisions, ...notice was given of the filing period and candidates did file within the time specified by statute." J.A. 68a. Accordingly, the appellee Election Commission was entirely justified in relying on legal advice based, as it was, on the Justice Department's pattern and practice with respect to the implementation of new candidate qualifying periods pending preclearance.

B. Certification of referendum results to South Carolina Code Commissioner.

The appellants originally asserted [J.A. 17a] that the appellees had failed to certify the May, 1982, referendum results to the South Carolina Code Commissioner in accordance with Section 3 of Act No. 549. J.S. App. 21a. They

have abandoned their argument concerning this alleged "change" because they now agree that the certification was in fact made. Brief for Appellants 12 n. 2. Accordingly, their argument regarding the lower court's declaration that an allegation of discriminatory intent or effect is necessary to a Section 5 action need not be reached by this Court because that declaration was made with reference to the certification "change". J.S. App. 8a. These appellees would note, however, that the lower court correctly declared the law in this regard. Cf., Dougherty County Board of Education v. White, 439 U.S. 32, 42 (1978); Georgia v. United States, 411 U.S. 526, 534 (1973) (§5 changes are those "which have the potential for diluting the value of the Negro vote and are within the definitional terms of §5"); United States v. Georgia, Civil Action No. C76-1531A, slip op. at 7 (N.D. Ga. September 30, 1977), aff'd 436 U.S. 941 (1978). The appellants' reliance on, inter alia, Allen v.

State Board of Elections, 393 U.S. 544 (1969), and Perkins v. Matthews, 400 U.S. 379 (1971), is misplaced because those decisions hold only that a local district court cannot determine whether or not a change in voting is in fact discriminatory in intent or effect. But the lower court's declaration does not reach that issue and the appellants have simply misread it.

The one significant point that remains notwithstanding the appellants' abandonment of their challenge to this alleged change is that their original assertion is totally inconsistent with their position regarding the opening of the statutorily prescribed filing period pending preclearance. On the one hand, they assert that the appellees violated the preclearance requirements of Section 5 when they allowed filing in accordance with the statute before obtaining preclearance. On the other hand, they complained that the failure of the appellees to certify the referendum results to the South Carolina Code Commissioner in accordance with the statute

irrespective of preclearance also violated Section 5. J.A. 12a, 17a. This basic inconsistency in approach, these appellees submit, highlights the fallacy of all of the appellants' Section 5 claims.

C. Abolishment of the office of Hampton County Superintendent of Education and devolution of his duties on elected boards of trustees.

The third allegedly unprecleared change is the abolishment of the elective office of county superintendent of education and the devolution of his duties on the elected boards of trustees. This change is precisely one of the changes effected by Act No. 549 [J.S. App. 19a], which has now been precleared in its entirety. The appellants also assert that the local officials have devolved the duties prematurely. J.S. 12. This assertion is vigorously denied by these appellees; moreover, even if it were true, the remedy is, as the lower court observed [Record Vol. III (Transcript of July 21, 1983 hearing 45)], an action in state court to enjoin a violation of

state law, not a Justice Department review of the unauthorized "change."

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE PRECLEARANCE OF ACT NO. 549 RENDERED THE STATUTE IMMEDIATELY ENFORCEABLE WITHOUT REQUIRING THE ADDITIONAL PRECLEARANCE OF IMPLEMENTING ACTION TAKEN SOLELY BECAUSE OF THE TIMING OF THE PRECLEARANCE.

The final allegedly unprecleared changes concern the holding of the election as soon as practicable after preclearance but on a date different from the one prescribed in the statute and without re-opening the filing for candidates. These appellees submit, however, that when the statutorily prescribed date cannot be met only because of an outstanding objection from the Attorney General which is ultimately withdrawn and literal compliance with the statute is thus impossible, the mere change in the date does not constitute a change which requires Section 5 preclearance. There are legal and practical reasons for this conclusion. First, the Attorney General, who administers the Voting Rights Act and whose interpretation is entitled to great weight

[cf., United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978)], manifestly did not consider the statutory date of the first election of the boards of trustees to be a change subject to preclearance because he precleared the statute seventeen days after the statutory date and did not caution, as he has often done, 9/ that any further submission was required. The holding of the initial election for the boards of trustees in March, 1983, rather than during the general election on November 2,1982, due solely to the outstanding Justice Department objection at the time of the general election, merely implemented the statute which had, in the meantime, been precleared. Cf., Berry v. Doles, supra. Factually, it is a de minimis change and legally it is no change. Moreover, the decision to hold the initial election as soon as practicable after preclearance, made,

---

9/ See, e.g. United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. at 115.

as it was, on the advice of the South Carolina Attorney General, represents a good faith effort to implement a statute whose preclearance reflects that it is more racially equitable and furthers the purpose of the Voting Rights Act to a greater extent than the former appointment process.

Finally, there are practical reasons underlying the decision to elect the boards of trustees as soon as possible without amending the precleared statute. There was the real possibility that an amendment expressly authorizing a later election date would not have been precleared in a timely fashion thereby necessitating another amendment. 10/ The amendment process could have gone on indefinitely. Furthermore, the March, 1983,

---

10/ The Solicitor General argues that preclearance could have been timely obtained had the appellees submitted the March, 1983 election date for preclearance in January, 1983. Brief for the United States as Amicus Curiae 17-18 n. 11. He overlooks the fact that, under his view of the absolute prohibition against any degree of implementation pending preclearance, the

initial election represents merely a one-time special election held in order to implement the statute and will not recur inasmuch as successive elections will be held on the general election schedule in accordance with the statute.

The failure to re-open filing for candidates for the March, 1983, initial election is not a change at all because the filing had already occurred pursuant to the statute on August 16-31, 1982. Indeed, the re-opening of filing would have constituted a change, arguably requiring preclearance before implementation because no authority existed for a second filing. But the decision not to re-open the filing period conformed with rather than changed the authorized

---

10/ (cont.) special election could not have been held in March, 1983, assuming preclearance by March, 1983, because candidates would not have been able to qualify pending preclearance and other preliminary steps such as noticing the election sixty days in advance as required by statute could not have been taken.

procedure. Furthermore, the appellants' theory for this alleged change is based on the erroneous assumption that a Section 5 change occurred in state law by virtue of the Attorney General's outstanding objection. They contend in effect that the opening of the filing period in August, 1982, instead of after November 19, 1982, constituted a covered change by reason of the outstanding objection. The outstanding objection, however, was not a change in state law. South Carolina law did not require that a filing period be opened subsequent to the Attorney General's preclearance of Act No. 549. Whether or not that enactment receives Section 5 preclearance is relevant only under federal law; it is not relevant in determining whether a change in state law has occurred because it is not a matter of state law. Therefore, the failure to re-open a filing period after preclearance cannot constitute a change in South Carolina law with respect to voting.

THe appellants have erroneously characterized the appellees' action in immediately implementing Act No. 549 once it was finally precleared as contrary to this Court's decisions that any change in voting is a covered change. See, e.g., Allen v. State Board of Elections, 343 U.S. 544, 566 (1969). None of the appellees, including these appellees, disputes that a change in an election date effected by legislation is a covered change; instead, they argue that a substitute election date made necessary solely by the timing of the preclearance, which timing makes literal compliance with the precleared statute impossible, and used only to effect the initial implementation of the precleared statute is not required to be additionally precleared. If this were so, then the purpose of the administrative preclearance alternative under Section 5, that is, "to provide a speedy alternative method of compliance to covered States" [Morris v. Gressette, 432 U.S. 491, 503 (1977)(emphasis

added)], might never be achieved. When the tremendous number of submissions which the Attorney General must review is considered, preclearances coming too late for literal compliance are to be expected. Indeed, this Court early on recognized that problems of administration would occur. Cf., Allen v. State Board of Elections, 393 U.S. at 169. While these appellees recognize that the burden of complying with Section 5 is primarily that of the covered jurisdictions, they have an equal responsibility to ensure the integrity of their state laws by enforcing them once preclearance is obtained. In the implementation of Act No. 549, the appellees have consistently and legitimately attempted to comply with Section 5, a law whose "potential severity" and "extraordinary remedy of postponing the implementation of validly enacted state legislation" this Court has repeatedly recognized. Morris v. Gressette, 532 U.S. at 504 [emphasis added].

The appellants apparently disagree with the Attorney General's preclearance of the provisions of Act No. 549. But they cannot seek judicial review of that official's failure to object even though it "may have been erroneous" because judicial review of the Attorney General's preclearance action is foreclosed. Morris v. Gressette, 432 U.S. at 5107, n. 24. They may now challenge the legislation only in a traditional action questioning its constitutionality [Allen v. State Board of Elections, 393 U.S. at 549-50], an action which is currently pending here. J.S. 6, n.3.

CONCLUSION

These appellees respectfully submit that the judgment entered in the cause by the three-judge District Court for the District of South Carolina should be affirmed.

Respectfully submitted,

SINKLER GIBBS & SIMONS
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

ATTORNEY for Appellees
Hampton County School
District No. 1 and
its Trustees

Bruce E. Davis*
Post Office Box 881
Camden, SC 29020
(803) 432-2880

ATTORNEY for Appellees
Hampton County School
District No. 2 and
its Trustees

*Counsel of Record

CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for these Appellees and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the foregoing Motion to Dismiss or Affirm were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows:

John Roy Harper, II
P. O. Box 843
Columbia, South Carolina 29202

Treva G. Ashworth
P. O. Box 11549
Columbia, South Carolina 29211

Lee S. Bowers
P. O. Box 95
Estill, South Carolina 29918

A. G. Solomons, Jr.
P. O. Box 969
Estill, South Carolina 29918

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

This 14th day of September, 1984.

Karen LeCraft Henderson
KAREN LeCRAFT HENDERSON

Post Office Box 11458
Columbia, S.C. 29211

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

REPLY BRIEF FOR APPELLANTS

JOHN R. HARPER, II*
3706 North Main Street
Post Office Box 843
Columbia, South Carolina 29202
(803) 771-4723

THOMAS I. ATKINS
MARGARET FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

J. LEVONNE CHAMBERS
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

*Counsel of Record

TABLE OF AUTHORITIES

Page

Cases:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 4

Berry v. Doles, 438 U.S. 190 (1978) 9

Blanding v. DuBose, 454 U.S. 393 (1982) 3

Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983) 4,7

McCain v. Lybrand, 104 S.Ct. 1037 (1984) 3

McDaniel v. Sanchez, 452 U.S. 130 (1982) 5

South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984) 7

Other:

28 C.F.R. § 51.20 6

S. Rep. No. 97-417 Cong. 2d Sess. (1982) 5,8,9

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., et al.,

Appellees.

On Appeal From the United States
District Court
For The District of South Carolina

==========

REPLY BRIEF FOR APPELLANTS

==========

The central issue in this case is whether either one of two parts of the election process -- setting an election date, and requiring candidates to file

within specific dates in order to run in that election--is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," within the meaning of section 5 of the Voting Rights Act.

The district court held against coverage, despite this Court's repeated decisions giving section 5 the broadest possible coverage. With no discussion or supporting authority, the district court named these events "steps in the implementation of a new statute," "administrative actions," and "ministerial acts" (J.S. 8a-9a), and decided that these characterizations took these critical events outside the reach of section 5.

The United States points out, however, that the Attorney General regards both changes as covered by section 5, and

his administrative practice has consistently done so. Brief for the United States as Amicus Curiae Supporting Appellants, pp. 13-15. That view is entitled to deference. Blanding v. DuBose, 454 U.S. 393, 401 (1982); see also McCain v. Lybrand, 104 S.Ct. 1037, 1049 (1984).

As to the change in the election date, the appellees concede that such a change is ordinarily covered by section 5: "None of the appellees, including these appellees, disputes that a change in an election date effected by legislation is a covered change; ..." Brief for the School District appellees, p. 27; see also Brief for the Election Commission appellees, p. 35. They are thus forced to argue that the form of a voting change is decisive, an argument which has been clearly

foreclosed since this Court's first section 5 case, Allen v. State Board of Elections, 393 U.S. 544 (1969)(bulletin issued by State Board of Elections covered by section 5). The appellees also argue that in setting a new election date they were simply trying to comply with the law once preclearance was obtained, but that is assuredly not a reason to skip section 5 scrutiny for the date selected.[1] As Congress recently reiterated, "even when changes are made for valid reasons, for

[1] At page 33 of their Brief, the Election Commission appellees point out that Busbee v. Smith held, in circumstances like these, that the state could postpone the election "until the earliest practicable date." 549 F. Supp. 494, 525 (D.C.C. 1082), aff'd, 459 U.S. 1166 (1983). What the appellees do not say is that when the state moved to select the "earliest practicable date" for a rescheduled election, that date had to be submitted for section 5 review and was in fact objected to by the Attorney General, necessitating its cancellation. 549 F. Supp. at 920-21

example, reapportionment or home rule, 'jurisdictions may not always take care to avoid discriminating against minority voters in the process.'" S. Rep. No. 97-417, p. 12 n.31 (1982), quoting Mc Daniel v. Sanchez, 452 U.S. 130 (1981).

As to the selection of a candidate filing period for the newly scheduled March election, that selection too--made in January 1983--was a change notwithstanding that the dates chosen were the same as those designed for a November election. The Attorney General takes this position and also indicates that his preclearance of Act 549 did not preclear the selection of a filing period for a March election. Brief for the United States, 19-20.

Moreover, the date selected enforced a filing period which had illegally taken place six months earlier at a time when

the statute was unenforcible because there was no preclearance. Following the district court's view, J.S. 8a-9a, the appellees repeatedly assert that holding the filing period before preclearance was simply an election preparation and did not constitute "enforcement" or "implementation" of a change. See, e.g., Brief for Election Commission appellees, pp. 8-9, 18, 19; Brief for the School District appellees, p. 13.[2] In fact, though, a

[2] The appellees note that Act 549 authorized no period for filing by candidates other than August 16-31, 1982, as if to say that the lack of statutory authority compelled them to use that period only. But the lack of specific statutory authorization was obviously no bar to setting a fresh election date without specific statutory authority. Appellees also suggest, Brief for Election Commission appellees, p. 4, that their two and one-half month delay in submitting Act 549 to the Attorney General was prompted by their waiting for the referendum to be held, even though the Section 5 regulations explicitly authorize submitting such a change before completion for the referendum. 28 C.F.R. §51.20.

filing period constitutes very real enforcement because once the qualification period closes, voters will be prevented from casting ballots for anyone who has not filed during that period--as happened in this case. Recognizing this reality, the cases have held that holding candidate qualifying periods before preclearance violates section 5, and in one of the recent cases a stay of an injunction was refused by two justices of this Court. Busbee v. Smith, C.A. No. 82-0665 (D.D.C. May 24, 1982), stay denied, A-12018 (May 25, 1982)(Burger, C.J.), reapplication for stay denied, A-1018 (June 1, 1982)(Rehnquist, J.), cited in Busbee v. Smith, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1963). See also South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984). These cases are consistent with the terms of section 5

which require not simply submission but timely submission, meaning submission before implementation. Congress has recently emphasized the importance of the timeliness requirement by repeated references, cited in our main Brief, during the consideration of the Voting Rights Act in 1982. See also S. Rep. No. 97-417, p. 47 (1982) ("Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law.")[3]

[3] The rule against premature enforcement is not simply symbolism. Enforcement of unprecleared changes imposes a real burden on those who are forced to choose between complying with an unprecleared voting change (often at great inconvenience or prejudice) and relying on the Voting Rights Act to one's detriment. The prejudice is especially great when an unprecleared candidate filing period is allowed to go forward. If there is a danger that the filing period will be enforced, notwithstanding the lack of preclearance, candidates forced to choose which offices to file for may find themselves--and their supporters--severely prejudiced by later events.

Finally, the appellees argue, following the district court, that if requiring candidates to file under Act 549 before preclearance was illegal, the illegality was nullified by the Attorney General's subsequent preclearance. But Congress has emphasized that section 5 has both a substantive requirement (changes must be non-discriminatory) and a procedural requirement (changes must be precleared before they can be implemented), and in the most recent extension of section 5 Congress explicitly said that subsequent preclearance does not undo a violation arising from premature implementation. See S. Rep. No. 94-417, p. 48 (1982), quoted at p. 42 of our main Brief. The appellees cite several cases, including Berry v. Doles, 438 U.S. 190 (1978), in which courts have held that a subsequent preclearance can be a factor to take

into account when a court is deciding on the relief for a violation. None of those cases remotely holds that a subsequent determination by the Attorney General that a particular voting change is non-discriminatory eliminates the procedural violation. Nor could any case so hold, in light of Congress' concern about non-submission and Congress' explicit statements addressed to that problem.[4]

[4] We believe the United States agrees with this view. At one point the Solicitor General does refer to instances in which "the Attorney General has extended retroactive clearance to a belatedly submitted change that had already been put into effect." Brief for the United States as Amicus Curiae Supporting Appellants, p. 21 n.15 (second sentence). To the best of our understanding, that sentence refers only to the fact that a voting change which is prematurely implemented does not thereby become ineligible for preclearance in its prospective applications. Whether a premature implementation calls for an order requiring the act (e.g. an election) to be redone legally is a question of relief for an equity court--if a suit is brought--and we know of no authority to suggest that the Attorney General's preclearance can be "retroactive" in the sense of making premature implementation legal.

In this case, any voter who wished to exercise the right to vote had to vote on an unprecleared election date, and could vote only for candidates who had qualified during an unprecleared filing period. Both these requirements directly contravened the explicit words of section 5, which provides that "unless and until" there is preclearance "no person shall be denied the right to vote for failure to comply with such voting qualification or prerequisite, or standard, practice, or procedure with respect to voting."

This case involves no more than variations on the same questions of section 5 coverage which have been repeatedly answered by Congress and this

Court. The answers are the same here, and the district court's decision that section 5 was not violated should be reversed.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

JOHN R. HARPER, II*
3706 North Main Street
Post Office Box 843
Columbia, S. Carolina 29202
(803) 771-4723

THOMAS I. ATKINS
MARGRETT FORD
186 Remsen Street
Brooklyn, New York 11201
(212) 858-0800

J. LeVONNE CHAMBERS
LANI GUINIER
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013

ARMAND DERFNER
5520 33rd Street, N.W.
Washington, D.C. 20015

Counsel for Appellants

*Counsel of Record